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Let Louisiana's Bastards Beat the Clock: It's Time to Amend Article 197

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* J.D./D.C.L., 2020, Paul M. Hebert Law Center, Louisiana State University. This Comment is dedicated to my family, especially my husband, Kevin Malone. Without their support, I would not be where I am today. Special thanks to Professor Lonegrass for introducing me to this topic, guiding me through a complex body of law, and providing thoughtful feedback throughout the writing process. Thank you to Professor Trahan for his advice on the retroactivity issues and for providing translations of relevant French doctrine. Lastly, thank you to the *Louisiana Law Review* Volume 79 and Volume 80 Editorial Boards for their tireless work and friendship.

INTRODUCTION: A BASTARD'S TALE

In 1986, Karla Coleman was born to an unmarried Louisiana couple.[1] Karla's father, Louis Hebert, also had a two-year-old son, Louis Jr., from a previous marriage.[2] Although both of Karla's biological parents raised her, Karla's parents remained unmarried.[3] During his lifetime, Louis never legally established that he was Karla's father.[4] When Louis died in December of 2005, he did not leave a will.[5] Louisiana law provided that

1. Karla Coleman's story is loosely derived from the facts of *Succession of Hebert*. In the case, Karla turned 19 a few months before her father died. That same year, she filed paternity test results with the trial court. Years later, she completed the requisite filiation action, attempting to prove her legal relationship to her father. Due to the delay, Karla's action was time-barred under both Louisiana Civil Code articles 209 and 197. *See In re* Succession of Hebert, 153 So. 3d 1101, 1102–05 (La. Ct. App. 3d Cir. 2014); *see also* LA. CIV. CODE art. 197 (2018); LA. CIV. CODE art. 209(C) (2005).

2. *See generally Hebert*, 153 So. 3d at 1102–03.

3. *See generally id.*

4. *See generally id.*

5. *See generally id.* In Louisiana, a "succession" is "the transmission of the estate of the deceased to his successors." LA. CIV. CODE art. 871 (2018). Louisiana recognizes two types of succession: "testate" and "intestate." *Id.* art. 873. When the decedent leaves a valid will, the succession is a "testate" succession. *Id.* art. 874. In the absence of a valid will, or in an "intestate" succession, the decedent's

Louis Jr. could inherit without first proving that Louis was his father;[6] however, Karla—a child born out of wedlock—faced a difficult path to receiving her inheritance.[7] Louisiana law required that Karla establish her legal relationship to Louis before she could inherit from him.[8] Although in early 2006, Karla filed paternity test results in court that demonstrated Louis was her father, she did not timely complete the filiation action required to establish a legal relationship with her father before her 19th birthday.[9] Karla simply turned 19 one year too early.[10]

Karla was caught within the web of a law that prevented a child born out of wedlock from inheriting if she failed to prove a biological connection to her father before her 19th birthday.[11] In 2005, the Louisiana Legislature revised the law to impose a more reasonable temporal limit on

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undisposed property devolves to the decedent's relatives by blood or adoption, as well as to the decedent's spouse. *See id.* arts. 880, 875.

6. Under Louisiana law, as a child born to Louis and his wife during their marriage, Louis Jr. was both a legally recognized heir, able to inherit intestate from his father, and a forced heir entitled to a portion of his father's estate as a first-degree descendent of Louis under 24 years old. *See generally* Kathryn Venturatos Lorio, *Successions and Donations*, *in* 10 LOUISIANA CIVIL LAW TREATISE § 10.1, 296–97 (2d ed. 2009); LA. CIV. CODE ANN. art. 197 cmt. a (2018); LA. CIV. CODE arts. 185, 1493(A) (2018); *see also* discussion *infra* Section I.A.1–2.

7. Although Karla was also young enough to qualify as a forced heir, she could not claim her portion of Louis's estate until she first proved that he was her father. Likewise, Karla could not inherit via intestacy laws because, as an unfiliated child, she was not Louis's heir. *See* Lorio, *supra* note 6, § 3.1, at 70–71; *see also* discussion *infra* Section I.A.1–2. Note that as a child born out of wedlock before the Louisiana Legislature revised the Civil Code articles on filiation, Karla was considered "illegitimate." *See* LA. CIV. CODE art. 180 (2005); *see also* Lucie R. Kantrow, *Presumption Junction: Honey, You Weren't Part of the Function—A Louisiana Mother's New Right to Contest Her Husband's Paternity*, 67 LA. L. REV. 633, 637 (2007); LA. CIV. CODE ANN. art. 197 cmt. a (2018). Louisiana law formerly distinguished between children born out of wedlock, or "illegitimate children," and children born to married parents, or "legitimate children." The old law limited the rights of children born out of wedlock, in effect privileging the nuclear family. *See* Lorio, *supra* note 6, § 3.1, at 70–71; Kantrow, *supra* note 7, at 637–38.

8. Filiation establishes the link required for heirship. LA. CIV. CODE ANN. art. 197 cmt. a (2018).

9. *See generally Hebert*, 153 So. 3d at 1103; *see also* LA. CIV. CODE art. 209 (2005).

10. *See generally Hebert*, 153 So. 3d at 1102–03; LA. CIV. CODE art. 197 (2018); LA. CIV. CODE art. 209 (2005).

11. *See generally* LA. CIV. CODE art. 209 (2005).

children filing paternity actions; nevertheless, a Louisiana appellate court refused to apply the new law to Karla.[12] The court found that applying the new law retrospectively would unfairly deprive Louis Jr. of his rights as Louis's lawful heir.[13] As a result, Louis Jr. inherited from his father, and Karla inherited nothing.[14]

At first blush, the retroactivity of Louisiana Civil Code article 197 seems an esoteric legal question, but a deeper look into the issue reveals that it is a matter of profound, practical importance.[15] The number of children born to unwed mothers in the United States has increased dramatically over the past few decades.[16] In 2018, 53.3% of Louisiana's children were born out of wedlock.[17] Children born out of wedlock thus compose a substantial portion of Louisiana's population; consequently, their inheritance rights are a pressing concern.[18] More than 10 years after the Louisiana Legislature eliminated Louisiana Civil Code article 209, most Louisiana appellate courts persistently apply the old law to these cases, preventing children like Karla from inheriting simply because they failed to establish paternity before their 19th birthdays.[19] Until 2016, all Louisiana appellate courts refused to apply the new article in cases like

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12. *See Hebert*, 153 So. 3d at 1103–04; LA. CIV. CODE ANN. art. 197 cmt. e (2018); *see also* LA. CIV. CODE art. 197 (2018); LA. CIV. CODE art. 209 (2005).

13. *See Hebert*, 153 So. 3d at 1103–04.

14. *See id.* at 1104–05.

15. *See generally* Lorio, *supra* note 6, § 3.1, at 69.

16. Lorio, *supra* note 6, § 3.1, at 69 (citing NAT'L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2007: WITH CHARTBOOK ON TRENDS IN THE HEALTH OF AMERICANS 143 tbl.10 (2007)). In 1970, only 10.7% of live births in the United States were to unmarried mothers. By the turn of the 20th century, the percentage reached 33.2%. NAT'L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2016: WITH CHARTBOOK ON LONG-TERM TRENDS IN HEALTH 94 tbl. 4 (2016). In 2018, children born to unmarried parents comprised 39.6% of all births across the nation. JOYCE A. MARTIN ET AL., NAT'L CTR. FOR HEALTH STATISTICS, BIRTHS: FINAL DATA FOR 2018, at 5 (2019).

17. MARTIN ET AL., *supra* note 16, at 5. Louisiana remains among the states with the highest percentages of children born out of wedlock. *See id.*

18. *See id.* at 6.

19. *See, e.g.*, Meaux v. Guidry, 140 So. 3d 871 (La. Ct. App. 3d Cir. 2014); *Hebert*, 153 So. 3d 1101; Thomas v. Roberts, 106 So. 3d 557 (La. Ct. App. 2d Cir. 2012); *In re* Succession of Bailey, 82 So. 3d 322 (La Ct. App. 5th Cir. 2011); *In re* Succession of Smith, 29 So. 3d 723 (La. Ct. App. 3d Cir. 2010); *In re* Succession of James, 994 So. 2d 120 (La. Ct. App. 1st Cir. 2008); Jeanmarie v. Butler, 942 So. 2d 578 (La. Ct. App. 4th Cir. 2006); Succession of Faget v. Faget, 938 So. 2d 1003 (La. Ct. App. 1st Cir. 2006); Succession of McKay, 921 So. 2d 1219 (La. Ct. App. 3d Cir. 2006).

Karla's.[20] By 2018, both the Louisiana Second and Third Circuit Courts of Appeal had changed tack, creating a circuit split.[21] Both courts held that new article 197 applied retroactively to the claim of a child born out of wedlock when that child turned 19 before the 2005 changes but whose father died after the 2005 revision.[22]

The proper resolution of the circuit split is essential for determining the inheritance rights of the many children born out of wedlock in Louisiana, but it also has broader implications.[23] The debate over the proper temporal effect of article 197 provides a crucial opportunity to clarify and advance Louisiana's doctrine of retroactivity as a whole, a doctrine that is challenging at best and incomprehensible at worst.[24] Resolving the debate would additionally elucidate another Louisiana temporal doctrine wrought with confusion—peremption.[25] To date, Louisiana courts have failed to properly situate the temporal effect of article 197 within the existing doctrines of retroactivity and peremption.[26] The recent decisions on the applicability of article 197 fail to bring clarity to Louisiana law.[27] As this Comment will demonstrate, the newly decided cases reach a doctrinally improper result, and the opposing decisions reach an inequitable solution.[28] At this point, only the Louisiana Legislature can bring clarity to Louisiana's law and provide equity for children born out of wedlock by amending article 197.[29]

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20. *See, e.g.*, Succession of Younger, 206 So. 3d 1088 (La. Ct. App. 2d Cir. 2016); *Meaux*, 140 So. 3d 871; *Hebert*, 153 So. 3d 1101; *Thomas*, 106 So. 3d 557; *Bailey*, 82 So. 3d 322; *Smith*, 29 So. 3d 723; *James*, 994 So. 2d 120; *Jeanmarie*, 942 So. 2d 578; *Faget*, 938 So. 2d 1003; *McKay*, 921 So. 2d 1219.

21. *See generally* Succession of Pelt, 244 So. 3d 476 (La. Ct. App. 3d Cir. 2018); *Younger*, 206 So. 3d 1088.

22. *See generally Pelt*, 244 So. 3d 476; *Younger*, 206 So. 3d 1088.

23. Louisiana's doctrines of retroactivity and peremption appear in various legal contexts. Any time that the Louisiana Legislature imposes a time limit on a right of action and later seeks to change that period, the doctrines are at issue. *See, e.g.*, Chance v. Am. Honda Motor Co., 635 So. 2d 177, 178 (La. 1994); Estate of Dean v. K-Mart Corp., 678 So. 2d 599, 601 (La. Ct. App. 5th Cir. 1996); Tran v. Avondale Shipyards, Inc., 665 So. 2d 507 (La. Ct. App. 5th Cir. 1995).

24. *See* discussion *infra* Section I.B.

25. Peremption, a doctrine unique to Louisiana law, refers to the time period imposed on the existence of a legal right. *See* LA. CIV. CODE art. 3458 (2018); *see also* discussion *infra* Section I.C.1.

26. *See* discussion *infra* Part II.

27. *See* discussion *infra* Section II.C.

28. *See* discussion *infra* Part II.

29. *See* discussion *infra* Part III.

Part I provides background information on the development of, and nuances in, Louisiana's law of filiation, retroactivity, and peremption. Part II elaborates on the conflicting interpretations and applications of article 197 in Louisiana's appellate courts, as well as critiques the courts' rationales. Part III argues that only the Louisiana Legislature can resolve the problem because the legislature possesses the sole power to amend article 197 and retroactively revive perempted filiation claims. Finally, the Conclusion will situate the proposed changes to the law within the broader context of Louisiana's law of retroactivity and peremption.

I. LAYING THE GROUNDWORK: LOUISIANA'S LAWS OF FILIATION, RETROACTIVITY, AND PEREMPTION

Louisiana Civil Code articles 209 and 197 involve three distinct areas of Louisiana law, each of which is challenging in its own right: filiation, retroactivity, and peremption.[30] Filiation concerns the legally recognized relationship between a parent and a child, which, in the context of this Comment, is crucial for determining whether a child can inherit from her father.[31] Retroactivity and peremption are temporal effects that the legislature may impose on a new law.[32] Specifically, retroactivity determines whether a new law applies retrospectively or prospectively.[33] Peremption is a temporal limit that the legislature imposes on a right of action created in a new law.[34]

A. Establishing the Paternal Link for Inheritance

Filiation is significant because legal consequences stem from establishing a legal connection to a parent.[35] Filiation is particularly relevant with respect to inheritance rights, which depend on the legally recognized relationships between a decedent–father and his relatives for

30. *See* discussion *infra* Section I.A–C.

31. *See* LA. CIV. CODE art. 178 (2018).

32. *See generally* Sally Brown Richardson, *Buried by the Sands of Time: The Problem with Peremption*, 70 LA. L. REV. 1179 (2010); J.-R. Trahan, *Time for a Change: A Call to Reform Louisiana's Intertemporal Conflicts Law (Law of Retroactivity of Laws)*, 59 LA. L. REV. 661 (1999) [hereinafter Trahan, *Time*].

33. *See generally* Trahan, *Time*, *supra* note 32.

34. *See generally* Richardson, *supra* note 32, at 1179.

35. *See* Kantrow, *supra* note 7, at 637; *see also* Helen Scott Johnson, *Louisiana's Presumption of Paternity: The Bastardized Issue*, 40 LA. L. REV. 1024, 1025 (1980).

the purposes of intestate succession and forced heirship.[36] In 2005, the Louisiana Legislature substantially revised the Civil Code articles on filiation.[37] Article 197 was one byproduct of the change in the law, replacing former article 209.[38] Both articles concern the time limits on a child's right to bring a filiation action.[39]

1. The Legal Relationship Between Father and Child

Filiation is the legal relationship between a child and her parent—the fact or condition of biological parentage.[40] Two kinds of filiation exist: filiation by nature, or filiation "according to the flesh," and filiation by law, or "adoptive filiation."[41] Filiation by nature arises by virtue of either an actual or presumed biological relationship between the parent and child.[42] Filiation by law requires an act and a judgment of adoption.[43]

Filiation is important because it is accompanied by rights and obligations that stem from the legal relationship between a parent and child.[44] Of particular significance is a biological child's right to inherit

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36. *See* LA. CIV. CODE ANN. art. 197 cmt. a (2018); *see also* Kantrow, *supra* note 7, at 637; Johnson, *supra* note 35, at 1025.

37. *See* Lorio, *supra* note 6, § 3.1, at 70–72.

38. *See generally* LA. CIV. CODE art. 197 (2018); LA. CIV. CODE art. 209 (2005).

39. *See generally* LA. CIV. CODE art. 197 (2018); LA. CIV. CODE art. 209 (2005).

40. LA. CIV. CODE art. 178 (2018); Kantrow, *supra* note 7, at 636; *see also* Succession of Robinson, 654 So. 2d 682, 684 (La. 1995). Filiation is "the [juridical] line that unites a child to his father or to his mother: to his father, paternal filiation or paternity; to his mother, maternal filiation or maternity." J.-R. Trahan, Glossae *on the New Law of Filiation*, 67 LA. L. REV. 387, 388 n.1 (2007) [hereinafter Trahan, *Filiation*] (citing GÉRARD CORNU, 195 DROIT CIVIL: LA FAMILLE 313 (7th ed. 2001)).

41. Trahan, *Filiation*, *supra* note 40, at 388 n.1 (citing JEAN CARBONNIER, DROIT CIVIL: LA FAMILLE: L'ENFANT, LE COUPLE 181–82 (20th ed. 1999)).

42. *See id.* (citing CORNU, *supra* note 40, at 313). The cases discussed in this Comment involve filiation by nature because the unfiliated children sought to establish that their fathers were their biological relatives. *See id.*; *see also, e.g.*, *In re* Succession of Hebert, 153 So. 3d 1101, 1103 (La. Ct. App. 3d Cir. 2014).

43. *See* Trahan, *Filiation*, *supra* note 40, at 388 n.1 (citing 1194 DROIT DE LA FAMILLE 389 (Jacqueline Rubellin-Devichi dir. 1999)).

44. *Id.* at 637; *see also* Johnson, *supra* note 35, at 1025 (Filiation "establishes from whom the child derives certain rights and to whom the child owes specific obligations.").

from her father.[45] Unless a valid will specifies otherwise, an unfiliated child, including a child born out of wedlock, cannot inherit without first establishing a legal connection to her father.[46]

A child born out of wedlock can prove that she has a biological relationship to her purported father.[47] Filiation is established by sufficient proof of paternity, maternity, or adoption.[48] An unfiliated child demonstrates her genetic connection to her parents through the filiation action.[49] Specifically, a child born out of wedlock must bring a paternity action, with the requisite proof of paternity, to establish filiation by nature.[50]

Prior to the 2005 revisions to Louisiana's filiation law, filiation actions were only possible in limited circumstances.[51] The pre-2005 Louisiana Civil Code provided that a child born out of wedlock must complete a filiation action either before her 19th birthday or within one year of her father's death, whichever came first.[52] Although children born out of

45. *See generally* LA. CIV. CODE ANN. art. 197 cmt. e (2018). This Comment is generally concerned with natural filiation as it relates to a father and child. By contrast, natural filiation between a mother and child is more easily established because "the mother of a child is the woman who gives birth to the child." *Id.* art. 184 cmt. a.

46. *See id.* art. 197 cmt. a; *see also* Kantrow, *supra* note 7, at 637; Johnson, *supra* note 35, at 1025.

47. *See* LA. CIV. CODE art. 197 (2018); LA. CIV. CODE art. 205 (2005). By contrast, under prior law, a child born out of wedlock could only acquire the right to inherit if one of the following circumstances were present: (1) her parents subsequently married and formally or informally acknowledged her; (2) she was legitimated by notarial act; or (3) she became filiated by an action proving her relation to the parent, instituted within one year of the parent's death or within 19 years of her birth, whichever came first. Lorio, *supra* note 6, § 3.1, at 71; *see also* LA. CIV. CODE arts. 198, 199, 200, 209(C) (2005).

48. LA. CIV. CODE art. 179 (2018). While her purported father is alive, a child must prove paternity by a preponderance of the evidence. Once he dies, however, the evidentiary burden increases to require clear and convincing evidence of paternity. *Id.* art. 197.

49. Kantrow, *supra* note 7, at 636–37; *see also* LA. CIV. CODE art. 197.

50. LA. CIV. CODE art. 197; Kantrow, *supra* note 7, at 636–37. In other contexts, a presumption of paternity determines natural filiation. *See* LA. CIV. CODE arts. 185, 186, 195, 196 (2019). For example, a child born to married parents is presumed to be the child of those parents. *See id.* arts. 184, 185; Kantrow, *supra* note 7, at 637–39. A father may also establish his paternity with a special form of acknowledgment by authentic act or by bringing an avowal action to prove his paternity. *See* LA. CIV. CODE arts. 190.1, 198.

51. Lorio, *supra* note 6, § 3.1, at 70–71.

52. *Id.* § 3.1, at 71; *see also* LA. CIV. CODE art. 209(C) (2005).

wedlock were not barred from inheriting, the law imposed a strict time limit on children who sought to bring a filiation action.[53] Only after timely instituting a filiation action could a child born out of wedlock benefit from the civil effects of filiation, gaining the rights to support, to sue for wrongful death, and to inherit intestate or as a forced heir.[54] Louisiana's succession law governs such inheritance rights.[55]

2. Forging a Path to Inheritance Through Filiation

For succession purposes, a child's relation to the decedent is significant, particularly in the context of intestate succession and forced heirship.[56] Importantly, an unfiliated child's right to bring a filiation action is *not* a succession right.[57] Rather, inheritance rights are an *effect* of filiation.[58] Once a child establishes filiation, she may gain succession rights, which allow her to inherit intestate or as a forced heir.[59]

Thus, when a father dies intestate, his estate devolves to his filiated children, who are his legal heirs.[60] Similarly, Louisiana's forced heirship laws provide that the decedent's children—and sometimes grandchildren—inherit a certain portion of his estate, regardless of whether he left a valid will.[61] If a child has no legal relationship with her

53. Lorio, *supra* note 6, § 3.1, at 70–71; *see also* LA. CIV. CODE art. 209(C) (2005).

54. LA. CIV. CODE ANN. art. 197 cmt. a (2018).

55. *See generally* LA. CIV. CODE art. 871 (2018).

56. *See* Lorio, *supra* note 6, § 3.1, at 70–71.

57. *See generally* LA. CIV. CODE ANN. art. 197 cmt. a (2018).

58. *See generally id.*

59. *See generally id.*; Lorio, *supra* note 6, § 3.1, at 70–71.

60. In an intestate succession, the decedent lacks a valid will. Consequently, the decedent's estate devolves by operation of law to the decedent's legal relatives and spouse. *See* LA. CIV. CODE arts. 880, 875 (2018).

61. *See* Lorio, *supra* note 6, § 10.1, at 295–96. Louisiana Civil Code article 1493 provides, in part:

> Forced heirs are descendants of the first degree who, at the time of the death of the decedent are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent. . . . For purposes of this Article "permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent" shall include descendants who, at the time of death of the decedent, have, according to medical documentation, an

father, she cannot inherit from him as a forced heir because she is not legally recognized as her father's descendant.[62] Indeed, only filiated descendants may be forced heirs.[63]

Forced heirship is significant to the present circuit split because, in some cases, the unfiliated children were young enough to qualify as forced heirs if they had timely completed their paternity actions.[64] For example, Karla Coleman was young enough to be a forced heir when her father died.[65] If Karla had established that Louis was her biological father before she turned 19, she would have inherited from him as a forced heir, regardless of whether he left a will and included her in it.[66] Under both old and new filiation law, Karla could inherit as a forced heir provided that she had timely asserted her rights.[67] Thus, the difference between articles 197 and 209 with respect to forced heirs is merely temporal.[68]

> inherited, incurable disease or condition that may render them incapable of caring for their persons or administering their estates in the future.

LA. CIV. CODE art. 1493 (2018). Forced heirship guarantees a percentage of the decedent's estate to designated heirs. The forced portion of the estate—comprised of each forced heir's legitime—is "reserved" for the heirs, whether a succession is testate or intestate. *See id.* art. 1494; Lorio, *supra* note 6, § 10.1, at 295–96. Forced heirs in their own right are the decedent's children who, at the time of the decedent's death, are 23 years old or younger. Forced heirs also include children of any age with a mental or physical infirmity who, at the time of the decedent's death, are permanently incapable of caring for themselves or administering their own estates. LA. CIV. CODE art. 1493(A). In certain circumstances, a forced heir need only be incapable at some time in the future. *See id.* art. 1493(E). Grandchildren may also be forced heirs by representation, due to the age of a predeceased parent or due to that grandchild's disability. *See id.* art. 1493(B)–(C).

62. *See* Lorio, *supra* note 6, § 3.1, at 70–71.

63. *See generally* LA. CIV. CODE ANN. art. 197 cmt. a (2018).

64. *See, e.g.*, *In re* Succession of Hebert, 153 So. 3d 1101, 1102–03 (La. Ct. App. 3d Cir. 2014).

65. *See generally id.*

66. *See generally id.*

67. *See* Lorio, *supra* note 6, § 3.1, at 70–71.

68. *See generally* LA. CIV. CODE art. 197 (2018); LA. CIV. CODE art. 209(C) (2005). In contrast to temporal limitations on filiation actions in the present circuit split, succession rights are governed by the law in effect at the time of the decedent's death: "Testate and intestate succession rights, including the right to claim as a forced heir, are governed by the law in effect on the date of the decedent's death." LA. CIV. CODE art. 870(B) (2018). Current Louisiana succession laws, therefore, do not distinguish between the decedent's children based on their status as children born out of wedlock for forced heirship purposes. *See generally id.*; *see also* Lorio, *supra* note 6, § 3.1, at 70–72; LA. CIV. CODE ANN. art. 197 cmt. a (2018).

3. A Change in the Law of Filiation: Article 197 Replaces 209

After several constitutional challenges to Louisiana's law of filiation, the Louisiana Legislature began a piecemeal revision of that portion of the Civil Code, which culminated in the significant 2005 revision.[69] As part of the revision, the Louisiana Legislature repealed former article 209 and replaced it with a new article—197.[70]

The relevant portion of former article 209(C) provided that a child born out of wedlock must bring her filiation action within one year of the death of her alleged father or within 19 years of her birth, whichever occurred first.[71] Purportedly, this narrow time limit promoted the policies of facilitating the timely administration of estates and minimizing uncertainty in the disposition of property.[72] Article 197, by contrast, provided that for succession purposes only, a child could bring a filiation claim within one year of her purported father's death.[73] The new article

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69. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 74 (1968); Succession of Clivens, 426 So. 2d 585 (La. 1982); Succession of Brown, 388 So. 2d 1151 (La. 1980); Succession of Thompson, 367 So. 2d 796 (La. 1979); Succession of Robins, 349 So. 2d 276 (La. 1977). The 2005 revision of the Code eliminated the legal distinction between children born out of wedlock and children born to married parents. *See generally* Katherine Shaw Spaht, *Who's Your Momma, Who Are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307, 307 n.1 (2007); Kantrow, *supra* note 7, at 641.

70. Lorio, *supra* note 6, § 3.1, at 71–72.

71. Louisiana Civil Code article 209 provided, in part:

> The proceeding required by this article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation, except for the sole purpose of establishing the right to recover damages under Article 2315. A proceeding for that purpose may be brought within one year of the death of the alleged parent and may be cumulated with the action to recover damages.

LA. CIV. CODE art. 209(C) (2005).

72. *See* Talley v. Succession of Stuckey, 614 So. 2d 55, 58–59 (La. 1993); Succession of Grice, 462 So. 2d 131, 135 (La. 1985). Notably, the Louisiana Supreme Court found article 209 constitutional because the 19-year peremptive period was long enough to provide children a reasonable opportunity to institute filiation proceedings, and the time period was "substantially related to the state's interest," including the timely disposition of a father's estate. *See Grice*, 462 So. 2d at 135–36.

73. Louisiana Civil Code article 197 provides:

removed the time limit imposed on filiation actions for all purposes except succession.[74] Thus, under current law, a child may bring a filiation action within one year of her purported father's death regardless of her age.[75]

The change in the law presents the question of which law would apply to cases where an unfiliated child turned 19 while article 209 was in effect but whose father died after article 197 took effect.[76] The issue boils down to a question of timing: Does article 197 apply retrospectively to revive her filiation claim, or did article 209's time limit bar her filiation claim forever?[77]

B. A Matter of Time: The Complexities of Louisiana's Law of Retroactivity

Louisiana's law of retroactivity is extremely complex and deeply flawed.[78] Intertemporal conflicts of law are a body of legal principles that govern the resolution of conflicts of law in time, a problem that traverses various legal fields.[79] At times, the Louisiana Legislature explicitly signifies the proper temporal application of a law in its enacting legislation; however, not all legislation provides clear guidance.[80] When ambiguity exists as to whether the legislature intended for a law to apply retroactively, the presumption is that the law should only apply prospectively, or forward in time.[81] In addition, the legislature passed two

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> A child may institute an action to prove paternity even though he is presumed to be the child of another man. If the action is instituted after the death of the alleged father, a child shall prove paternity by clear and convincing evidence.
>
> For purposes of succession only, this action is subject to a peremptive period of one year. This peremptive period commences to run from the day of the death of the alleged father.

LA. CIV. CODE art. 197 (2018). The new rule does not distinguish between filiated and unfiliated children. Spaht, *supra* note 69, at 322–23.

74. *See* LA. CIV. CODE art. 197.

75. *See id.*

76. *See, e.g.*, Succession of Pelt, 244 So. 3d 476 (La. Ct. App. 3d Cir. 2018); Succession of Younger, 206 So. 3d 1088 (La. Ct. App. 2d Cir. 2016).

77. *See, e.g.*, *Pelt*, 244 So. 3d 476; *Younger*, 206 So. 3d 1088.

78. Jackie M. McCreary, *Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues Through the Revised Civil Code Articles on Disinherison*, 62 LA. L. REV. 1321, 1321 (2002).

79. Trahan, *Time*, *supra* note 32, at 665–66.

80. *See id.* 681–82.

81. McCreary, *supra* note 78, at 1324.

laws governing the retroactive application of laws, but these rules do little to resolve the inherent complexities of a retroactivity analysis.[82]

1. Legislative Origins of Retroactivity

The legal principles governing retroactivity originate in Louisiana Civil Code article 6 and Louisiana Revised Statutes § 1:2, as well as in the jurisprudence and doctrine surrounding them.[83] According to article 6, the Louisiana Legislature can impose any temporal effects it desires on a new piece of legislation.[84] Article 6, therefore, requires that courts discern the legislature's intent regarding a law's temporal effects.[85] If the legislature's intent is unclear, then courts must classify the law as "procedural," "substantive," or "interpretative."[86] Article 6 authorizes retroactive application of laws that the courts deem procedural and interpretative, absent legislative expression to the contrary and subject to constitutional protections.[87] Substantive legislation only applies prospectively, but the other two statutory classifications apply both prospectively and retroactively.[88] Louisiana Revised Statutes § 1:2 provides that the legislature can impose whatever temporal effects it desires on new legislation, and if the legislature's intent is unclear, courts cannot apply a statute retroactively.[89]

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82. *See id.*

83. Trahan, *Time*, *supra* note 32, at 666.

84. *Id.* at 679.

85. *Id.*

86. *Id.*

87. P. Raymond Lamonica & Jerry G. Jones, *Legislative Law and Procedure*, *in* 20 LOUISIANA CIVIL LAW TREATISE § 6.4, 115–16 (2004). "In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary." LA. CIV. CODE art. 6 (2018).

88. Trahan, *Time*, *supra* note 32, at 680; *see also* LA. CIV. CODE art. 6.

89. Trahan, *Time*, *supra* note 32, at 681–82; *see also* LA. REV. STAT. § 1:2 (2018) ("No Section of the Revised Statutes is retroactive unless it is expressly so stated."). At face value, article 6 and Louisiana Revised Statutes § 1:2 conflict. Louisiana courts resolve the apparent conflict by reading article 6 and Louisiana Revised Statutes § 1:2 as co-extensive, such that the statutory prohibition on retroactivity applies only to substantive laws. Trahan, *Time*, *supra* note 32, at 684–85; *see also* Lamonica & Jones, *supra* note 87, § 6.4, at 115. Professor Trahan argues that the courts' interpretation does not resolve the conflict implicit in article 6 and Louisiana Revised Statutes § 1:2. *See* Trahan, *Time*, *supra* note 32, at 708–10.

Based on these provisions, a Louisiana retroactivity analysis contains two essential prongs: (1) determine the Louisiana Legislature's intent; and (2) classify the law.[90] Adding to the confusion, no legislation provides a definition of retroactivity.[91] Courts therefore struggle to determine whether a new law would apply retroactively in a particular case and thereby fall within the scrutiny of article 6.[92]

2. Louisiana Courts and the Quest to Define Retroactivity

One of the principal flaws with Louisiana's retroactivity laws is the absence of a single definition for the concept of retroactivity.[93] After the legislature failed to provide a definition of retroactivity, Louisiana courts invented two theories defining retroactivity—the "vested rights" and "completed acts" theories.[94] Both theories of retroactivity are vague and impracticable.[95] The reigning definition among Louisiana courts is the

90. *See* Lamonica & Jones, *supra* note 87, § 6.4, at 116.

91. Trahan, *Time*, *supra* note 32, at 684.

92. *Id.*

93. *Id.* at 766.

94. *Id.* This Comment considers only the "vested rights" definition of retroactivity because it is modern Louisiana courts' approach to retroactivity. A minority of Louisiana courts use a "completed acts" definition of retroactivity, which can be characterized as a more "intuitive" approach. Under the "completed acts" definition, the question is not if a right has been *acquired*, but if an act has been *realized* under the old law. Put another way, acts completed while the old law was in effect are governed by the old law; conversely, acts completed after the imposition of the new law are governed by the new law. *Id.* at 694–96. For example, if the legislature passes a law requiring defendant–insurers to pay a settlement agreement within 30 days of its execution, and the insurers fail to pay within 30 days, the new law applies prospectively to the insurers. The insurers' conduct, exposing them to liability, occurred after the statute became law. Under the "completed acts" theory, it does not matter that the insurance policy and the plaintiff's accident predated the statute. All that matters is that the insurers' act of violating the settlement law occurred after the new law's enactment. *See id.*; *see also* Manuel v. La. Sheriff's Risk Mgmt. Fund, 664 So. 2d 81 (La. 1995).

95. McCreary, *supra* note 78, at 1325. By contrast, Paul Roubier's work on retroactivity greatly influenced the modern civilian approach to the problem of retroactivity and reconciled some of the problems inherent in the traditional approaches. *Id.* at 1327; *see generally* PAUL ROUBIER, LE DROIT TRANSITOIRE: CONFLITS DES LOIS DANS LE TEMPS (2d ed. 1960). Roubier's system, which has been adopted by a few civil law jurisdictions, including France, revolves around the notion of "juridical situations." Eva Steiner, *Judicial Rulings with Prospective Effect—From Comparison to Systematisation*, *in* 3 COMPARING THE PROSPECTIVE EFFECT OF JUDICIAL RULINGS ACROSS JURISDICTIONS 20 (Eva Steiner ed., 2015).

vested rights theory of retroactivity, which is the only theory of retroactivity that courts apply in the present circuit split.[96] The essential function of Louisiana's vested rights definition of retroactivity is to determine whether a law will apply retroactively at all—that is, backward in time—as opposed to prospectively.[97]

A secondary issue is that various interpretations of the term "vested rights" complicate Louisiana courts' application of the vested rights theory of retroactivity.[98] As used by Louisiana courts, the term generally consists of two components: (1) a vested right is a present right; and (2) a vested right is a property, or patrimonial, right.[99]

Vested rights are present rights because they are presently realized and exercisable.[100] Although all vested rights are present rights, all present rights are not vested.[101] A present right is not "vested unless it is 'absolute,

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A juridical situation is a "complex of rights and duties." McCreary, *supra* note 78, at 1325 (citing PAUL ROUBIER, DROITS SUBJECTIFS ET SITUATIONS JURIDIQUES 52, 53 (1963)). Juridical situations are not completed instantaneously. Essentially, Roubier's theory proposes a tripartite system for classifying the effects that laws have on juridical situations. Some laws retroactively affect juridical situations; some laws have an immediate effect on juridical situations; and some old laws survive changes to the new law. Most temporal problems arise because courts confuse the distinction between the "retroactive" and "immediate" effects on juridical situations. Steiner, *supra* note 95, at 20. Roubier posits that only the retroactive effect of a law is problematic in situations where a juridical situation resulted in fully extinguished facts, which cannot be affected by new law. Roubier's theory promotes, as a general rule, the immediate effect—that is, the application of a new law to a present situation—to regulate intertemporal conflicts of law. *Id.*; *see generally* ROUBIER, *supra* note 95. No Louisiana court has adopted Roubier's approach. *See* McCreary, *supra* note 78, at 1327.

96. *See generally* Trahan, *Time*, *supra* note 32.

97. *See id*. at 688–89 n.74. Louisiana's vested rights theory of retroactivity closely parallels the once dominant civilian "theory of acquired rights." *Id.* at 688. Likewise, the function of the civil law theory of acquired rights was to determine whether a new law would apply retroactively or prospectively. *See id*. at 688–89 n.74.

98. *See* Rebecca Barrett Hall, *A Wolf in Sheep's Clothing: Dressing-up Substantive Legislation to Trigger the Interpretive Exception to Retroactivity Violates Constitutional Principles*, 67 LA. L. REV. 599, 616 (2007); *see also* Michael A. Cancienne, Smith v. LASERS*: The Louisiana Supreme Court Adjusts a Legislative Miscalculation*, 65 LA. L. REV. 881, 898–901 (2005) (discussing the faulty application of vested rights).

99. Trahan, *Time*, *supra* note 32, at 690.

100. *See generally* Hall, *supra* note 98, at 617.

101. Trahan, *Time*, *supra* note 32, at 690–91.

complete and unconditional, independent of a contingency.'"[102] Vested rights are therefore theoretically distinguishable from "expectant rights," which are rights that are not yet realized nor exercisable.[103] Subsequent legislation may retroactively destroy expectant rights, but it may not abridge vested rights.[104] For example, in a torts context, if John hits Mary in the back of the head, Mary's right to sue John does not vest until John injures her.[105] Once John hits Mary in the back of the head, she has a present right—the vested right to sue John for the tort of battery.[106] By contrast, a different scenario illustrates expectant rights.[107] Again, John hits Mary in the back of the head, but this time Mary employs Ginger as her attorney in her suit against John.[108] Mary and Ginger enter a contingency fee agreement, wherein Ginger's pay is contingent upon Mary's successful recovery against John. Ginger's right to a portion of Mary's recovery is an expectant right because it is contingent on the mere expectancy of a future benefit.[109]

More specifically, a vested right is a property right, or under civilian nomenclature, a "patrimonial" right.[110] Patrimonial rights are "susceptible of pecuniary evaluation."[111] For example, Mary's right in her tort suit against John is patrimonial in nature because her suit has a monetary value.[112] Similarly, patrimonial juridical acts[113] create, modify, or

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102. *Id.* at 691 (quoting Tennant v. Russell, 39 So. 2d 726, 728 (La. 1949)).

103. *See* Hall, *supra* note 98, at 617.

104. *Id.*

105. *See generally id.*

106. *See generally id.*

107. *See generally* Trahan, *Time*, *supra* note 32, at 690; *see also* Tennant v. Russell, 39 So. 2d 726, 728 (La. 1949).

108. *See generally* Trahan, *Time*, *supra* note 32, at 690; *see also Tennant*, 39 So. 2d at 728.

109. *See generally* Trahan, *Time*, *supra* note 32, at 690; *see also Tennant*, 39 So. 2d at 728.

110. Trahan, *Time*, *supra* note 32, at 690; *see also* SAÚL LITVINOFF & THOMAS TÊTE, LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS 140 (1969). Louisiana courts often use the terms "patrimonial right" and "property right" interchangeably. *See* A.N. Yiannopoulos, *Property*, *in* 2 LOUISIANA CIVIL LAW TREATISE § 1:3, 4 (4th ed. 2001) (noting that courts use the word property "broadly to denote rights forming part of a person's patrimony, and narrowly to denote rights conferring on a person a direct and immediate authority for the use and enjoyment of a thing that is susceptible of appropriation.").

111. Trahan, *Time*, *supra* note 32, at 690.

112. *See generally id.*

113. In the civil law tradition, legal relationships may be formed by the wills of the parties and are given effect by law. These relationships are referred to under

extinguish rights with a pecuniary value.[114] For example, when parties contract to sell a piece of land, the contract is an example of a patrimonial juridical act.[115] An extra-patrimonial juridical act, conversely, involves rights that are not subject to pecuniary evaluation.[116] Extra-patrimonial juridical acts concern family and personal rights, such as adoption and marriage.[117]

A third key and vexing feature of Louisiana's retroactivity analysis is that the notion of vested rights arises numerous times within the analytical chain.[118] In fact, the notion of vested rights appears in three distinct stages of the retroactivity analysis: (1) in determining whether a retroactive application of a law is necessary; (2) in evaluating whether a law is substantive; and (3) in deciding whether a proposed application of a statute, already found to have a retroactive application, is constitutionally permissible.[119] The definition of vested rights retains the same general meaning in all contexts, although the term principally developed in the constitutional law context.[120] Louisiana's law of retroactivity thus presents an intriguing blend of old civil law retroactivity doctrine and American jurisprudence that contemplates constitutional due process issues posed by the retroactive effect of laws.[121]

Putting these pieces together, the vested rights theory defines a retroactive law as one that "takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability with respect to transactions or considerations already passed."[122] A vested rights approach to retroactivity begins with two considerations: (1) whether the proposed application of a new statute

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Louisiana law as "juridical acts." Conversely, "juridical facts" are legal relationships that are imposed without regard to the wills of the parties. For example, the civil obligation to repair the harm done to another person through a tort is a juridical fact imposed on the tortfeasor by law. By contrast, a contractual agreement is formed by the wills of the parties involved and legally recognized after the fact. A contract is, therefore, a juridical act. LITVINOFF & TÊTE, *supra* note 110, at v–vi. Juridical acts may be further classified by the legal fiction that distinguishes between patrimonial and extra-patrimonial acts. *Id.* at 140.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id*.

118. *See* Trahan, *Time*, *supra* note 32, at 688–89 n.74–75.

119. *See id*.

120. *See id*. at 689 n.76; discussion *infra* Section I.B.3.

121. *See id*. at 688–89 n.74–75.

122. *Id*. at 687 (quoting Brown v. Indem. Ins. Co., 108 So. 2d 812 (La. Ct. App. 2d Cir. 1959)).

is retroactive or prospective, which depends on how it affects "existing rights and obligations"; and (2) if the application of the new law alters any "rights and obligations," the law is retroactive.[123] Simply put, if a statute deprives someone of a vested right, then the application is retroactive.[124] If the statute does not deprive someone of a vested right, then the application is prospective.[125]

The vested rights analysis also considers the time at which a party acquires the right to assert a cause of action.[126] When the party acquires the right to assert a cause of action, that right is a "vested" property right imbued with due process protections.[127] In Louisiana, the moment a party can sue to protect her right, the cause of action accrues and the right is "vested."[128] For example, once John hits Mary in the back of the head, Mary's vested right to sue John in a tort action arises immediately upon her injury.[129] If the legislature subsequently changed the law to provide that only men can sue for tort actions *before* Mary sued John, the new law would prevent Mary from bringing her claim, thereby affecting her vested right.[130] The new law, therefore, invokes a retroactive application.[131]

The determination of whether article 197 divests a vested right is therefore essential to resolving the circuit split.[132] The threshold determination under a Louisiana retroactivity analysis is whether retroactive application of a new law occurs at all.[133] Courts must consider whether a change in the law of filiation affects anyone's vested rights and, thus, whether article 197 calls for a retroactive application at all.[134] The retroactivity analysis includes a determination of which rights are at issue and whether the right to bring a filiation action constitutes a vested and patrimonial right or simply an extra-patrimonial right, which does not have retroactive implications.[135] The preliminary vested rights consideration

123. *Id*. at 693.
124. *See id*. at 689.
125. *Id*.
126. Hall, *supra* note 98, at 617.
127. *Id*. (citing Bourgeois v. A.P. Green Indus., 783 So. 2d 1251, 1259 (La. 2001)).
128. *Id*.
129. *See generally id*.
130. *See generally id*.
131. *See generally id*.
132. *See* discussion *infra* Section III.B.
133. *See generally* Trahan, *Time*, *supra* note 32.
134. *See generally id*.
135. *See generally id*.

constitutes the first layer of a Louisiana retroactivity analysis.[136] A court's subsequent mission in a Louisiana retroactivity analysis is to search for and give effect to the Louisiana Legislature's intent.[137]

3. Louisiana's Vested Rights Retroactivity Analysis: Discerning Legislative Intent and the Classification Schema

Once the threshold vested rights analysis occurs, Louisiana courts may proceed to the second part of the retroactivity analysis, which consists of a two-part analysis under article 6.[138] If a law would apply retroactively under the vested rights definition, then courts generally should give deference to the legislature's intent in applying the law.[139] Pursuant to Louisiana's civil law influences, Louisiana courts do not engage in statutory interpretation unless the courts first justify that an interpretation is necessary to clarify ambiguity in the law.[140] The article 6 retroactivity analysis, therefore, hinges on the Louisiana Legislature's intent for a law to apply retroactively or prospectively.[141]

The Louisiana Supreme Court interprets article 6 as imposing a two-fold analysis to determine whether to apply a law retroactively.[142] First, a court should ascertain whether the enacted legislation expresses the legislature's intention for the new law to apply prospectively or retroactively.[143] Second, if the court finds legislative intent, the court's inquiry ends, unless the enactment impairs contractual obligations or vested rights.[144] If, however, a court fails to find the legislature's intent, or if the legislature's intent is unclear, the court's interpretation continues.[145]

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136. Lamonica & Jones, *supra* note 87, § 6.4, at 116.

137. *Id*.

138. *Id*.

139. *Id*.

140. *See id*.; *see also* LA. CIV. CODE art. 9 (2018) ("When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."); *id*. arts. 10–13.

141. Lamonica & Jones, *supra* note 87, § 6.4, at 116.

142. *See generally* Cole v. Celotex Corp., 599 So. 2d 1058 (La. 1992); *see also* Lamonica & Jones, *supra* note 87, § 6.4, at 116 (citing Keith v. U.S. Fid. & Guar. Co., 694 So. 2d 180 (La. 1997)).

143. *See Cole*, 599 So. 2d at 1063–64; Lamonica & Jones, *supra* note 87, § 6.4, at 116.

144. *See Cole*, 599 So. 2d at 1063–64; Lamonica & Jones, *supra* note 87, § 6.4, at 116.

145. *See Cole*, 599 So. 2d at 1063–64; Lamonica & Jones, *supra* note 87, § 6.4, at 120.

When the legislature's intent is unclear, the enactment must be classified as procedural, interpretative, or substantive.[146] A procedural law describes the "method of enforcing, processing, administering, or determining rights, liabilities, or status."[147] Interpretative legislation "establish[es] the meaning of prior law, rather than creat[ing] new rules."[148] Again, although substantive legislation only applies prospectively, interpretative and procedural legislation apply both retroactively and prospectively.[149]

Vested rights appear again in the classification scheme, playing a role in defining substantive laws.[150] Courts use the vested rights analysis not only to determine if a law is retroactive, but also to determine if a law is substantive.[151] A substantive law "creates, confers, modifies, or destroys rights, causes of action, or legal duties."[152] Put another way, substantive legislation establishes vested rights because substantive legislation establishes new rights.[153] As a result, laws that create new vested rights should only apply prospectively.[154]

The third and final layer of a Louisiana retroactivity analysis involves determining whether a law clearly designated as retroactive or classified as a type of law that applies retroactively violates constitutional due process principles.[155] Sometimes, the Louisiana Legislature designates a law as retroactive, which means that courts must apply it retroactively, unless doing so contravenes constitutional provisions.[156] When this occurs, courts apply the vested rights test a third time to determine if the legislature's change to the law impermissibly alters a right such that it would infringe upon constitutional due process principles.[157] If the court

146. *See Cole*, 599 So. 2d at 1063–64; Lamonica & Jones, *supra* note 87, § 6.4, at 120. Professor Trahan argues that these categorical distinctions leave much to be desired because Louisiana courts have failed to clearly and consistently delineate the boundaries between them. Trahan, *Time*, *supra* note 32, at 756–63.

147. Lamonica & Jones, *supra* note 87, § 6.4, at 121; *see also* Prejean v. Dixie Lloyds Ins. Co., 655 So. 2d 303, 308 (La. 1995).

148. Lamonica & Jones, *supra* note 87, § 6.4, at 121.

149. *Id*.

150. *Id*.

151. *Id*.

152. *Id*. at 120; *see also* Keith v. U.S. Fid. & Guar. Co., 694 So. 2d 180 (La. 1997); St. Paul Fire & Marine Ins. Co. v. Smith, 609 So. 2d 809 (La. 1992).

153. Hall, *supra* note 98, at 616 (citing Anderson v. Avondale Indus., 798 So. 2d 93, 97 (La. 2001)).

154. *See id.*; McCreary, *supra* note 78, at 1325.

155. *See* Hall, *supra* note 98, at 617.

156. *See id.*

157. *Id.*

finds that the law attempts to alter a vested right, then the court considers retroactive application an "impermissibl[e] alter[ation]."[158] Courts interpret changes to substantive law as violations of constitutional due process because the retroactive application of a law that alters an existing right attaches consequences to behavior without sufficient notice.[159]

An illustration of the entire Louisiana retroactivity analysis is useful for demonstrating the principles previously discussed.[160] Using the prior example, suppose that John hits Mary in the back of the head, but before Mary can bring her tort suit, the legislature changes the law to provide that only men can sue in tort actions.[161] The first layer of Louisiana's retroactivity analysis is therefore satisfied because the new law invokes a retroactive application.[162] Again, the new law prevents Mary from bringing her claim and thus affects her vested right to sue John.[163] The second step is to determine the legislature's intent under the two-part article 6 analysis.[164] A court would first look at the statute to determine if the legislature expressly provided for the law to apply retroactively.[165] For example, if the legislature clearly stated that the new law "applied both retroactively and prospectively to all tort claims," a court would likely find that the first prong of the article 6 analysis was satisfied because the legislature's intent with respect to the temporal application of the law is "clear and unequivocal."[166] Reaching the second prong of the article 6 analysis would be unnecessary.[167] At that point, the court would move on to the third step of the retroactivity analysis to determine if the new law violated Mary's due process rights.[168] Here, because her vested right to sue was impaired by the new law, it is likely the court would find that applying the new law retroactively would violate Mary's constitutional rights.[169] Therefore, the court would be unwilling to apply the law retroactively.[170]

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158. *Id.* at 616.
159. *Id.* at 617–18.
160. *See* discussion *supra* Section I.B.
161. *See generally* Hall, *supra* note 98, at 617.
162. *See generally id.*
163. *See generally id.*
164. *See generally* LA. CIV. CODE art. 6 (2018); Cole v. Celotex Corp., 599 So. 2d 1058 (La. 1992).
165. *See generally Cole*, 599 So. 2d 1058.
166. *See, e.g.*, Chance v. Am. Honda Motor Co., 635 So. 2d 177, 178 (La. 1994).
167. *See generally id*; *see also* LA. CIV. CODE art. 6.
168. *See generally* Hall, *supra* note 98, at 617.
169. *See generally id.*
170. *See generally id.*

By contrast, suppose the legislature did not clearly state that the new law should be applied retroactively.[171] If that were the case, then the court would find the legislature's intent unclear during the first part of the article 6 analysis.[172] Then, the court would proceed to classify the new law as procedural, interpretative, or substantive.[173] Here, the court would most likely classify the law as substantive because, as explained prior, it is likely that the court would find that the law affected Mary's vested right to sue in tort—modifying or destroying her right to sue.[174] The general rule is that such substantive legislation does not apply retroactively.[175] Consequently, the court would likely find that the law should not apply retroactively.[176] Reaching the third layer of the analysis would be unnecessary in this scenario.[177] Yet if the court instead classified the new law as merely interpretative, the court would then have to reach the constitutional due process step because even though an interpretative law may apply retroactively, the court should not apply it retroactively if it would divest Mary of her constitutional rights.[178]

As vested rights appear in three prongs of the retroactivity analysis—determining whether a retroactive application of a law is necessary, evaluating whether a law is substantive, and deciding whether a proposed retroactive application of a statute is constitutionally permissible—the retroactivity analysis seems illogical and potentially nonsensical.[179] The circular reasoning of Louisiana's vested rights retroactivity analysis leads to the incoherent conclusion that no law affecting a vested right can ever apply retroactively.[180] This logic conflicts with the text of article 6, which

171. *See generally Cole*, 599 So. 2d 1058; *see also* LA. CIV. CODE art. 6.
172. *See generally Cole*, 599 So. 2d 1058.
173. *See generally id.*; *see also* LA. CIV. CODE art. 6.
174. *See generally* Lamonica & Jones, *supra* note 87, § 6.4, at 120–21.
175. *See generally* LA. CIV. CODE art. 6.
176. *See generally* Hall, *supra* note 98, at 617.
177. *See generally id.*
178. *See generally id.* at 617–18.
179. *See generally id.*
180. *See generally id.* In theory, only laws that affect vested rights will satisfy the initial vested rights retroactivity inquiry. If a law does not affect a vested right, then applying it should not invoke a retroactive application of law. A court would never need to reach the two-part article 6 analysis. However, if a law affects a vested right at the threshold level, it would also affect vested rights at either the article 6 or the constitutional due process levels of the retroactivity analysis. Thus, any law affecting a vested right will likely never apply retroactively. Moreover, according to the vested rights definition of retroactivity, a law that does not affect vested rights does not invoke a retroactivity analysis at all. *See* discussion *supra* Section I.B.

recognizes the possibility that such laws may apply retroactively.[181] Although confusing and illogical, one aspect of Louisiana's retroactivity analysis is clear: If vested rights are not at stake, courts should have no issue applying a law retroactively.[182] Nevertheless, resolving the problem that article 197 and now-repealed article 209 pose does not end with a retroactivity analysis because both articles involve a second temporal issue—peremptive periods.[183]

C. Extinguished Rights: Louisiana's Doctrine of Peremption

Articles 197 and 209 both include temporal limitations on filiation actions.[184] When the Louisiana Legislature imposes a time limit on a party's right to bring an action, the retroactivity analysis implicates further complexities because the analysis includes a second level of time limitations.[185] Specifically, once a claim expires under an old law, courts must consider whether a new law can revive that claim or otherwise extend the old law's time limit.[186] Thus, a fundamental question in resolving the circuit split is whether article 197 can revive a child's filiation claim that expired under article 209.[187]

1. Separating Prescription from Peremption

Peremption is a time period that the legislature imposes on the existence of a right.[188] Unless a litigant timely exercises her right, the passage of a peremptive period extinguishes the right.[189] Peremption is rooted in the doctrine of liberative prescription, which was originally introduced under Roman law as an equitable means of temporally limiting

181. *See generally* LA. CIV. CODE art. 6 (2018).
182. *See generally* Hall, *supra* note 98, at 617–18. Of course, pursuant to a vested rights definition of retroactivity, a law that does not affect a vested right does not invoke a retroactivity analysis in the first place. Perhaps this problematic definition is the reason Louisiana courts so often skip over the threshold inquiry in their retroactivity analyses. *See* Trahan, *Time*, *supra* note 32, at 684.
183. *See generally id.*
184. *See generally id.*
185. *See generally id.*
186. *See generally id.*
187. *See generally id.*
188. *See* LA. CIV. CODE art. 3458 (2018).
189. *See id.*

recently created actions.[190] The Louisiana Legislature did not add peremption to the Louisiana Civil Code until the 1982 revision.[191]

Prior to the inclusion of peremption in the Civil Code, Louisiana courts drew from the French doctrine of "forfeiture" to create what Louisiana courts referred to as "peremption."[192] French prescriptive periods promoted equity for debtors by limiting the time in which creditors could assert claims against them, although creditors could assert some defenses to prescription.[193] By contrast, the notion of forfeiture promoted the policy of protecting debtors from all prescription-related safeguards for the creditor, effectively weighing the policy of protecting debtors over the creditor's right to collect a debt.[194] Under French law, forfeitures were beyond the reach of the rules governing prescription, such as interruption and suspension of the time limitation imposed.[195] Instead, the expiration of the time period forever ended a creditor's right to assert a claim against a debtor.[196] Regardless of the reason for the delay, the creditor forfeited her right to sue if she did not timely file her claim.[197]

The operation of peremption under Louisiana law is quite similar.[198] In Louisiana, prescription requires that a party acquiring a right assert that

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190. Richardson, *supra* note 32, at 1182–83. Liberative prescription is the civil law equivalent of common law statutes of limitations; essentially, a liberative prescriptive period bars untimely claims from litigation. Rachel L. Kovach, *Sorry Daddy—Your Time Is Up: Rebutting the Presumption of Paternity in Louisiana*, 56 LOY. L. REV. 651, 661 (2010).

191. Marjorie Nieset Neufeld, *Prescription and Peremption—The 1982 Revision of the Louisiana Civil Code*, 58 TUL. L. REV. 593, 601 (1983).

192. Richardson, *supra* note 32, at 1184. Although Louisiana courts drew peremption from French law and the concept of forfeiture, French law does not have a precisely equivalent doctrine. Louisiana's doctrine of peremption apparently mutated from its original source due to common law influences. Benjamin West Janke & François-Xavier Licari, *The French Revision of Prescription: A Model for Louisiana?*, 85 TUL. L. REV. 2, 23–24 (2010).

193. Richardson, *supra* note 32, at 1183.

194. *Id.* at 1183–84.

195. *Id.* at 1184. Peremptive periods are not subject to renunciation, interruption, or suspension. *See* LA. CIV. CODE art. 3461 (2018). Renunciation is an *ex-post* alteration of a creditor's ability to file suit (allowing a debtor to renounce a right to bar the creditor's suit after the creditor's time period has run), whereas suspension (pausing the time period) and interruption (stopping the time period and restarting it when the interruption ends) are *ex-ante* alterations. Richardson, *supra* note 32, at 1189–90.

196. Richardson, *supra* note 32, at 1184.

197. *Id.*

198. *See id.*

right by filing the claim before the prescriptive period completely runs, barring any suit after accrual of the period.[199] By contrast, the expiration of a peremptive period extinguishes the right, and the parties' actions have no effect on extending the running of the time period.[200] In other words, a prescriptive period bars the remedy, but a peremptive period destroys the right.[201] As no right exists after the peremptive period lapses, litigation cannot proceed beyond the established period.[202] No doctrine can alter peremptive periods.[203]

Peremption was originally a court-created doctrine, and, as such, Louisiana courts traditionally bore the burden of identifying whether the legislature intended for a time period to have the effects of peremption or prescription.[204] Courts have nevertheless struggled to distinguish between the two doctrines since peremption's inception.[205] Likewise, in the circuit split at issue, the courts frequently confounded peremptive and prescriptive periods, which vitally prevented some courts from

199. Neufeld, *supra* note 191, at 602.

200. *Id.*

201. Jeffrey J. Gelpi, *Has Prescription Preempted Peremption?: A Plea to Bury the Ghosts of Survival Actions*, 89 TUL. L. REV. 253, 259 (2014).

202. Richardson, *supra* note 32, at 1188. For this reason, a perempted claim cannot serve as a natural obligation. *See id*. at 1191–92. Further, because peremption destroys the underlying right, a party who files suit after the period elapses has no cause of action because she has no right, which is why courts may raise the exception of peremption sua sponte. *See id*. at 1193.

203. *See id*. at 1189.

204. Gelpi, *supra* note 201, at 260. The Civil Code does not provide guidance for determining whether a particular time period is prescriptive or peremptive in the absence of express legislative intent; when this occurs, the interpretive task is left to the courts. *See id.*

205. Richardson, *supra* note 32, at 1204. Originally, Louisiana courts followed the *Guillory* test. *Id*. at 1206. The focus of the test was whether the Louisiana Legislature, in one statute, created a previously nonexistent cause of action coupled closely with a time limit. *See* Guillory v. Avoyelles Ry. Co., 28 So. 899, 901 (La. 1900). The *Guillory* test developed over time to focus on the text and purpose of the statute as well. Richardson, *supra* note 32, at 1206–07. The modern test consists of two parts: (1) whether the Louisiana Legislature clearly worded the statute such that there is no doubt as to its intent to create a peremptive or prescriptive period; and (2) when additional interpretation is necessary, courts must look to the purpose of the statute. *Id*. at 1207. Some courts and scholars tried to make bright-line rules to facilitate consistent application of the test. Neither the test itself nor the attempts at establishing bright-line rules have resolved the difficulties courts face in determining whether a statute imposes a peremptive or prescriptive period in the absence of clear legislative intent. *Id*. at 1207–08.

interpreting articles 197 and 209 in a doctrinally correct manner.[206] Although the legislature did not expressly provide that article 209 imposed a peremptive period, Louisiana courts and scholars interpreted it as peremptive in nature.[207] Likewise, under the plain language of article 197, the temporal period is peremptive.[208] Nevertheless, in the present circuit split, the courts failed to distinguish between the doctrines of peremption and prescription and, consequently, failed to properly apply the doctrines governing the retroactive revival of extinguished claims.[209] As a result, the courts often relied on jurisprudence concerning the interaction of retroactivity and prescriptive periods, including the seminal Louisiana Supreme Court decision in *Chance v. American Honda Motor Co*.[210]

2. Chance v. American Honda Motor Co.*: Retroactivity and Prescription Collide*

Although problematic in its own right, *Chance v. American Honda Motor Co.* highlights another glaring question within Louisiana's vested rights retroactivity analysis: Can the Louisiana Legislature alter prescriptive or peremptive periods by reviving previously time-barred claims?[211] In *Chance*, the Louisiana Supreme Court encountered the specific issue of whether a new prescriptive statute, which extended a previous prescriptive period, applied retroactively to revive a then-prescribed cause of action.[212] If the court found that the legislature was unable to change a prescriptive or peremptive period through the enactment of a new law because doing so violated a vested right, then any time the legislature imposes a new time period in a new law, the legislature also restricts its own future power to change that law.[213] On the other hand, if the court found that the legislature could extend a prescriptive period, then the law could unfairly deprive some litigants of the defense that they

206. *See generally* Trahan, *Time*, *supra* note 32.

207. *See, e.g.*, Talley v. Succession of Stuckey, 614 So. 2d 55, 58 (La. 1993); *see also* Trahan, *Filiation*, *supra* note 40, at 443.

208. *See* LA. CIV. CODE art. 197 (2018) ("For purposes of succession only, this action is subject to a *peremptive period* of one year.") (emphasis added).

209. *See generally* Richardson, *supra* note 32; *see also* discussion *infra* Part II.

210. *See generally* Chance v. Am. Honda Motor Co., 635 So. 2d 177 (La. 1994); *see also* discussion *infra* Part II.

211. *See generally* Lamonica & Jones, *supra* note 87, § 6.4, at 124 n.62.

212. *Chance*, 635 So. 2d at 178.

213. *See* Lamonica & Jones, *supra* note 87, § 6.4, at 124 n.62.

were protected from suit by the passage of time.[214] The court therefore found itself in an uncomfortable position, in which the issue of retroactivity ultimately hinged upon how the court chose to classify the new law—as procedural or substantive.[215]

As the *Chance* decision demonstrates, Louisiana courts often have difficulty drawing a line between the categories of procedural and substantive laws, or they intentionally obfuscate the line to obtain a particular result.[216] In the context of prescriptive and peremptive periods, once a cause of action accrues, Louisiana courts consider the cause of action a vested property right that cannot be "constitutionally divested."[217] As a general rule, Louisiana courts deem laws affecting prescriptive or peremptive periods to be procedural laws.[218] Courts, therefore, should give retroactive effect to laws affecting peremptive or prescriptive periods, except when doing so would impermissibly disturb preexisting vested rights.[219]

Although the *Chance* court observed that prescriptive statutes generally are procedural in nature, the court refused to apply the new statute retroactively because it could revive a prescribed claim.[220] That is, the court found that a retroactive application would impermissibly disturb a vested right.[221] Interestingly, the court determined that the right to plead the peremptory exception of prescription as a defense in a lawsuit was a vested right.[222] The plurality of the *Chance* court reclassified the new law

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214. *See generally Chance*, 635 So. 2d 177; *see also* Lamonica & Jones, *supra* note 87, § 6.4, at 124 n.62 (citing Cameron Par. Sch. Bd. v. Acands, Inc., 687 So. 2d 84 (La. 1997)).

215. *See Chance*, 635 So. 2d at 178.

216. Trahan, *Time*, *supra* note 32, at 757.

217. For example, the Louisiana Supreme Court indicated that a cause of action accrues when a party has the right to sue. Cole v. Celotex Corp., 599 So. 2d 1058, 1063–64 n.15 (La. 1992). In addition, the Louisiana Supreme Court applied the same reasoning to defenses against causes of action. *See* Falgoust v. Dealers Truck Equip. Co., 748 So. 2d 399 (La. 1999); *see also* Lamonica & Jones, *supra* note 87, § 6.4, at 124 (citing *Cole*, 599 So. 2d at 1063–64).

218. *See* Lamonica & Jones, *supra* note 87, § 6.4, at 124–25.

219. *See id.* (citing *Falgoust*, 748 So. 2d 399). Finding that the right to plead the exception of prescription or peremption is a vested right may effectively limit the Louisiana Legislature's power to revive a cause of action that has already prescribed. *See id.* at 124 n.62 (citing Cameron Par. Sch. Bd. v. Acands, Inc., 687 So. 2d 84 (La. 1997)); *Chance*, 635 So. 2d at 177; Louisiana Health Serv. & Indem. Co. v. McNamara, 561 So. 2d 712, 718 (La. 1990).

220. *Chance*, 635 So. 2d at 178.

221. *See id.*

222. *Id.*

as substantive because "the defendant acquires the right to plead the exception of prescription," and "a change in that right constitutes a substantive change in the law as applied to the defendant."[223] According to the *Chance* plurality justices, when the Louisiana Legislature extends a prescriptive period, the change is substantive, and the new law should not apply retroactively absent a legislative expression.[224] Yet favoring the defendant's supposed right to plead the exception of prescription must result in the divestment of the plaintiff's right to assert a cause of action.[225] Implicit in the plurality opinion is the notion that the classification of a law as procedural or substantive is relative to the parties—what is procedural to the plaintiffs may be substantive to the defendants in the same case.[226]

The concurring justices agreed that the law should not apply retroactively but disagreed with the plurality's rationale, instead invoking the vested rights approach.[227] These justices also argued that the new legislation certainly was procedural in nature but provided an exception to the general rule governing procedural legislation.[228] Lastly, the concurrence found that because the right to plead the exception of prescription is a vested right, an otherwise procedural piece of legislation should not apply retroactively to divest that vested right.[229] The distinction between the plurality and the concurring opinions was that the concurring justices proceeded through the two-step article 6 portion of the retroactivity analysis before reaching the constitutional vested rights analysis.[230] The plurality opinion stopped at the second step of the article 6 analysis.[231] The result was effectively the same because vested rights appear at both the second step of the article 6 retroactivity analysis and at the due process constitutionality analysis.[232]

The *Chance* plurality decision creates further problems in a retroactivity analysis overlaid with peremption or prescription issues

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223. *Id.*

224. *See id.*; *see also* Trahan, *Time*, *supra* note 32, at 680; *see also* LA. CIV. CODE art. 6 (2018).

225. *See* discussion *supra* Section I.B.2–3.

226. *See* Trahan, *Time*, *supra* note 32, at 759 n.293.

227. *Chance*, 635 So. 2d at 180 (Hall, J., concurring).

228. *Id.*

229. *Id.* Professor Trahan observes that the plurality's attempt to reclassify the legislation as substantive was the greater blunder. Trahan, *Time*, *supra* note 32, at 759 n.293.

230. *See Chance*, 635 So. 2d at 180 (Hall, J., concurring); *see* discussion *supra* Section I.B.3.

231. *See Chance*, 635 So. 2d at 178; *see* discussion *supra* Section I.B.3.

232. *See* discussion *supra* Section I.B.3.

because the decision implies that the Louisiana Legislature cannot change prior law to have a more liberalizing effect unless the new law expressly provides for a retroactive application.[233] Both the plurality and the concurrence rely upon the notion that a defendant's right to plead the exception of prescription is a vested right.[234] If Louisiana courts subscribe to the idea that both the rights to assert a cause of action and to defend against that cause of action are vested rights, then, necessarily, no Louisiana court will ever find that a new law affecting prescriptive or peremptive periods applies retroactively in cases subject to pecuniary evaluation.[235] As such, Louisiana courts have continually failed to address the question of whether the legislature can revive time-barred claims because prior jurisprudence provides an impetus to reach a premature conclusion.[236] *Chance* and its jurisprudential ilk, however, are only one more piece of the picture.[237] Civil law and American constitutional law doctrines provide more cogent answers to the question of whether courts or a state legislature may revive a perempted filiation claim.[238]

3. Causae Finitae*: The Civilian Approach to Extinguished Claims*

Except for the two courts in the circuit split at hand, no Louisiana courts to date have explicitly revived a perempted claim.[239] Most

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233. *See generally* Trahan, *Time*, *supra* note 32.

234. *See generally Chance*, 635 So. 2d at 177. The Louisiana Supreme Court's finding that the right to plead the exception of prescription or peremption is a vested right theoretically limits the Louisiana Legislature's power to revive a cause of action that is already prescribed or perempted, a problem outside of the scope of this Comment. *See* Lamonica & Jones, *supra* note 87, § 6.4, at 124 n.62 (citing Cameron Par. Sch. Bd. v. Acands, Inc., 687 So. 2d 84 (La. 1997)).

235. *See* discussion *supra* Section I.B.2–3.

236. *See* discussion *supra* Section I.B.2–3.

237. *See generally Chance*, 635 So. 2d at 177.

238. *See generally* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); *see also* ROUBIER, *supra* note 95, at 32.

239. *See generally* Succession of Pelt, 244 So. 3d 476 (La. Ct. App. 3d Cir. 2018); Succession of Younger, 206 So. 3d 1088 (La. Ct. App. 2d Cir. 2016); *see also* Benjamin West Janke, *Revisiting Contra Non Valentem in Light of Hurricanes Katrina and Rita*, 68 LA. L. REV. 497, 536 (2008) (collecting cases). Louisiana courts have certainly entertained the idea of reviving perempted claims. *See, e.g.*, *Acands*, *Inc*., 687 So. 2d at 84; *Chance*, 635 So. 2d at 178; Succession of Faget v. Faget, 938 So. 2d 1003, 1007 (La. Ct. App. 1st Cir. 2006); Succession of McKay, 921 So. 2d 1219, 1223 (La. Ct. App. 3d Cir. 2006). Notably, some Louisiana courts have skirted the issue of reviving perempted claims by asserting that the time limit was neither prescriptive nor peremptive. Thus, the courts

Louisiana courts follow the *Chance* approach and refuse to retroactively revive a perempted claim in the absence of a "clear and unequivocal" expression of legislative intent.[240] Louisiana courts' reluctance to use jurisprudence to revive perempted claims finds support in the civil law doctrine of *causae finitae*.[241]

Causae finitae, or the principle of extinguished actions, prevents the retroactive application of new legislation or judicial decisions from affecting litigation that was previously terminated by prior final judgment or compromise or that was barred by prescription.[242] Extinguished claims can "no longer be affected by a new law."[243] New law may not affect extinguished claims, but new law may have an immediate effect on litigation currently in progress, or *causa pendentes*.[244]

Causae finitae is the default rule in the civil law tradition, applying only in the absence of the legislature's express intent to revive extinguished causes of action.[245] Thus, the legislature can expressly

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avoided the difficult question of determining whether a new law could retroactively revive a perempted claim. *See, e.g.*, Estate of Dean v. K-Mart Corp., 678 So. 2d 599, 601 (La. Ct. App. 5th Cir. 1996); Tran v. Avondale Shipyards, Inc., 665 So. 2d 507, 510 (La. Ct. App. 5th Cir. 1995). For example, the Fifth Circuit Court of Appeal subverted the *Guillory* test by finding that a former workers' compensation statute created a cause of action for death benefits and defined its existence with reference to a specific time period in which the worker must die to create that cause of action. Instead of framing the time limitation in the former statute as a peremptive period, the court argued that the time period merely required a "condition precedent to the accrual of the right of action," that is, the worker's death. *See Dean*, 678 So. 2d at 601; *Tran*, 665 So. 2d at 510 (emphasis omitted); *see also supra* note 205.

240. Janke, *supra* note 239, at 536–37; *see also Chance*, 635 So. 2d at 178.

241. *See* Hulin v. Fibreboard Corp., 178 F.3d 316, 323 (5th Cir. 1999).

242. *See id.* (citing ROUBIER, *supra* note 95, at 32). The concept of *causae finitae* parallels the notion of res judicata. *See* JACQUES GHESTIN & GILES GOUBEAUX, 462 TRAITÉ DE DROIT CIVIL: INTRODUCTION GÉNÉRALE 415 (3d ed. 1990). Res judicata, or "the thing adjudged," is a doctrine barring re-litigation of claims between the parties that have already progressed to a final judgment. *See* LA. REV. STAT. § 13:4231 (1991); *see also id.* (2019); Frank L. Maraist, *Civil Procedure–Special Proceedings*, *in* 1 LOUISIANA CIVIL LAW TREATISE § 4.3, 52–53 (2005).

243. *See generally* ROUBIER, *supra* note 95, at 32.

244. *See generally id.*

245. *See id.*; PATRICE LEVEL, 90 ESSAI SUR LES CONFLITS DE LOIS DANS LE TEMPS 161 (1959) ("Retroactive legislation is excluded, in terms of its effect, from *causae finitae*. To extend the application of the new law to anterior claims that have been terminated by a judicial decision, there must be an express disposition contained in the retroactivity clause.").

provide that new legislation applies retroactively to previously terminated claims, and the doctrine of *causae finitae* excludes such expressly retroactive legislation.[246] By contrast, civil law doctrine provides that courts cannot revive extinguished causes of action.[247] Although few Louisiana courts have considered the issue, Louisiana law likely posits a bar to the retroactive application of a new jurisprudential interpretation to prescribed actions.[248] By analogy to peremption, the same logic would apply—that is, courts may not unilaterally revive perempted claims.[249]

Under the factual circumstances in the circuit split at issue, therefore, it is impossible for Louisiana courts to retroactively revive a filiation claim perempted by article 209.[250] Even if a Louisiana court classified article 197 as procedural under article 6 in an attempt to apply article 197 retroactivity—an unlikely result in light of *Chance*—the doctrine of *causae finitae* would prevent that court from reviving filiation claims extinguished under article 209.[251] Although Louisiana courts do not have the power to revive claims perempted under article 209, the Louisiana Legislature does.[252] Nevertheless, the civil law doctrine of *causae finitae* is only part of the analysis because Louisiana's law of retroactivity must also comport with American constitutional law principles.[253]

4. Constitutional Due Process: The American Approach to Extinguished Claims

The common law approach to the revival of extinguished claims is similar to the civil law *causae finitae* approach.[254] In general, American constitutional law and civil law principles align: State legislatures may

246. *See generally* PATRICE LEVEL, 19 ESSAI SUR LES CONFLITS DE LOIS DANS LE TEMPS 33 (1959); LEVEL, *supra* note 245, at 161–62.

247. *See* GHESTIN & GOUBEAUX, *supra* note 242, at 415.

248. *See* Hulin v. Fibreboard Corp., 178 F.3d 316, 323 (5th Cir. 1999) (observing that "although there is a dearth of jurisprudential discussion on the subject, there would appear to be a similar bar to the retroactive application of a new jurisprudential interpretation to actions that have been finally terminated by judgments or compromises, or extinguished by prescription").

249. *Cf. Hulin*, 178 F.3d at 323.

250. *See id.*

251. *See generally id.* (citing ROUBIER, *supra* note 95, at 32); *see also* discussion *supra* Section I.C.2.

252. *See generally* ROUBIER, *supra* note 95, at 32.

253. *See* Trahan, *Time*, *supra* note 32, at 688–89 n.74–75.

254. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); *cf.* ROUBIER, *supra* note 95, at 32.

revive or extend causes of action circumscribed by prior law.[255] In *Chase Securities Corp. v. Donaldson*, the United States Supreme Court held that a state legislature may repeal or extend a statute of limitations even after a prior statute of limitations has run.[256] A state legislature's power to alter statutes of limitations is consistent with the Fourteenth Amendment as long as the time lapse does not divest a party with title to real or personal property.[257] The Court also distinguished between laws that affect substantive rights and laws that are remedial or procedural.[258] Statutes of limitations, the Court noted, "go to matters of remedy, not to destruction of fundamental rights."[259] The Court further observed that statutes of limitations have never been regarded as "fundamental rights" and merely represent a public policy about the privilege to litigate.[260] Unlike substantive laws, statutes of limitations are "good only by legislative grace."[261]

As a result, statutes of limitations are generally subject to a significant degree of legislative control.[262] Based on the reasoning that legislative amendments to statutes of limitations are remedial rather than substantive in nature and therefore do not affect vested rights, American courts have subsequently found that state legislatures can revive causes of action extinguished under previously imposed time limitations.[263] Like Louisiana courts, American common law courts similarly require express legislative intent for the revival of such causes of action.[264]

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255. *See Chase*, 325 U.S. at 314; *cf.* ROUBIER, *supra* note 95, at 32.
256. *Chase*, 325 U.S. at 311.
257. *Id*.
258. *Id*. at 314.
259. *Id.*
260. *Id.*
261. *See id.*
262. *Id.*
263. *See, e.g.*, *id.*; Campbell v. Holt, 115 U.S. 620 (1885); Murphree v. Raybestos–Manhattan, 696 F.2d 459, 460 (6th Cir. 1982); *see also* Int'l Union of Elec., Radio, and Mach. Workers v. Robbins & Myers, 429 U.S. 229, 243–44 (1976) (finding that Congress could constitutionally provide for retroactive application of an extended time period, thereby reviving an action that was already barred by a statute of limitations when filed). Of course, this cannot be the case if the state legislature or constitution otherwise prohibits the retroactive application of laws. *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91, 95–96 n.1 (1982) (observing that Texas courts would not retroactively apply a statutory amendment because the Texas Constitution prohibited retroactive application of laws, such that the state legislature could not divest a defendant of her right to rely on a statute of limitations as a defense by reviving or extending the bar of limitation).
264. 54 C.J.S. *Limitations of Actions* § 18 (2019).

The closest common law analog to a peremptive period is a statute of repose.[265] A statute of repose "limits the time within which an action may be brought and is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered."[266] The bar on causes of actions not brought within the specified time limit is absolute, unlike a statute of limitations, for which the bar is conditional.[267]

As opposed to statutes of limitations jurisprudence, common law jurisprudence on statutes of repose is unsettled.[268] By conceptualizing statutes of repose as "substantive" in nature, some common law courts find that legislatures may not revive causes of action barred by statutes of repose because doing so would violate due process principles by depriving defendants of their vested property rights.[269] Most courts, however, find that statutes of repose do not create vested property rights and thus do not implicate due process concerns.[270] Legislatures can therefore retroactively revive those extinguished claims.[271] In these jurisdictions, the rules for statutes of repose are fundamentally the same as those for statutes of limitations.[272] A third, but similar, line of common law jurisprudence posits that even if a defendant has a vested property right in repose, that right should yield to a legislature's retroactive application of a law when important state interests are at issue.[273]

In general, the American common law approach to revivals of extinguished causes of action falls in line with the civil law doctrine of *causae finitae*, except that some common law jurisdictions do not allow legislatures to revive causes of action barred by statutes of repose.[274] Whether a common law court will allow the retroactive revival of a claim barred by a statute of repose hinges on whether the court considers the change substantive or if the new law otherwise affects a vested right.[275] Although common law statutes of repose are not the same as Louisiana's peremptive periods, in both Louisiana and common law jurisprudence, if

265. Kovach, *supra* note 190, at 661; Janke, *supra* note 239, at 536–37.
266. 54 C.J.S. *Limitations of Actions* § 7 (2019).
267. *Id.*
268. *Id*. at § 18.
269. *See id.*
270. *See id.*
271. *See id.*
272. *See id.*
273. *Id.*
274. *Cf. id.*; Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); ROUBIER, *supra* note 95, at 32.
275. *See* 54 C.J.S. *Limitations of Actions* § 18.

a change in the law does not affect a party's vested right, then the law may apply retroactively.[276]

As previously indicated, Louisiana courts have not directly addressed whether the Louisiana Legislature may revive perempted claims.[277] After comparing the jurisprudence and doctrine of both civil law and common law jurisdictions, it seems likely that the Louisiana Legislature may revive causes of action extinguished under a previously imposed time limit.[278] Based on the text of article 6, the influences of the civil law doctrine of *causae finitae* on Louisiana law, and Louisiana's jurisprudential incorporation of the common law constitutional due process notions of vested rights, the Louisiana Legislature should have the power to expressly revive perempted claims.[279] The revival of a perempted action, moreover, remains constitutional as long as the legislative change does not impair vested rights.[280] Article 197, therefore, can only revive claims preempted by article 209 if the Louisiana Legislature expresses its intention for the new law to retroactively revive those claims.[281] Both common and civil law doctrine sanction the Louisiana Legislature's power to retroactively revive perempted filiation claims, as long as applying article 197 retrospectively does not affect any parties' vested rights and the Louisiana Legislature expressly provides for a retroactive application.[282]

II. THE CIRCUIT SPLIT: COMPETING INTERPRETATIONS OF LOUISIANA'S LAW OF RETROACTIVITY

After the 2005 revision of the Civil Code, Louisiana courts struggled with whether to apply article 197's peremptive period to revive filiation claims that were previously perempted under article 209.[283] All Louisiana appellate courts formerly dealt with the retroactivity problem by finding that the right to bring a filiation claim expired upon a child's 19th birthday, pursuant to article 209.[284] These courts asserted that the Louisiana

276. *See id*.; *see* discussion *supra* Section I.B.
277. *See* discussion *supra* Section I.C.
278. *See generally* ROUBIER, *supra* note 95, at 32; *Chase*, 325 U.S. 304.
279. *See* discussion *supra* Section I.B–C.
280. *See Chase*, 325 U.S. at 314.
281. *See generally* ROUBIER, *supra* note 95, at 32.
282. *See generally Chase*, 325 U.S. 304.
283. *See, e.g.*, Succession of Pelt, 244 So. 3d 476, 480–82 (La. Ct. App. 3d Cir. 2018); LA. CIV. CODE art. 197 (2018); LA. CIV. CODE art. 209(C) (2005).
284. *See, e.g.*, Thomas v. Roberts, 106 So. 3d 557 (La. Ct. App. 2d Cir. 2012); *In re* Succession of Bailey, 82 So. 3d 322 (La. Ct. App. 5th Cir. 2011); *In re* Succession of Smith, 29 So. 3d 723 (La. Ct. App. 3d Cir. 2010); *In re* Succession

Legislature did not expressly provide for a retroactive application of article 197 and that reviving extinguished filiation claims would deprive other heirs of their vested right to plead the exception of peremption.[285] More recently, the Second and Third Circuits overruled their previous decisions, creating the present circuit split.[286] Both courts found that an unfiliated child who turned 19 before 2005 could bring a filiation action within one year of her father's death.[287] The circuit split demonstrates the inherent problems with Louisiana's retroactivity and peremption analyses and further indicates that a judicially fashioned solution cannot resolve the article 197 quandary in a fair, doctrinally sound manner.[288]

A. Majority Approach: You're Too Late, Kid!

The Louisiana Legislature's 2005 revisions to the law of filiation created problems for Louisiana courts almost immediately.[289] The earliest appellate court to contemplate the issue was the Third Circuit in 2006.[290] In *Succession of McKay*, the court first considered the legislature's intent as to the retroactive application of article 197 based on the language in article 197's enacting legislation.[291] The enacting legislation provided that the new law "shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date."[292] The Third Circuit relied on previous interpretations of similar enacting legislation and concluded that the legislature did not provide a "clear and unequivocal" intention for the new law to revive

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of James, 994 So. 2d 120 (La. Ct. App. 1st Cir. 2008); Jeanmarie v. Butler, 942 So. 2d 578, 579 (La. Ct. App. 4th Cir. 2006); Succession of McKay, 921 So. 2d 1219 (La. Ct. App. 3d Cir. 2006).

285. *See, e.g.*, *James*, 994 So. 2d at 125–26. In the enacting legislation for article 197, the Louisiana Legislature expressed that the new article "shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date." Act No. 192, 2005 La. Acts 1444, 1459.

286. *See generally Pelt*, 244 So. 3d 476; Succession of Younger, 206 So. 3d 1088 (La. Ct. App. 2d Cir. 2016).

287. *See Pelt*, 244 So. 3d at 486; *see also Younger*, 206 So. 3d 1088.

288. *See* discussion *infra* Section II.A–C.

289. *See, e.g.*, Succession of Faget v. Faget, 938 So. 2d 1003 (La. Ct. App. 1st Cir. 2006); *McKay*, 921 So. 2d 1219.

290. *See generally McKay*, 921 So. 2d 1219.

291. *See id.*

292. *See id.* at 1223; *see also* Act No. 192, 2005 La. Acts 1444, 1459.

perempted filiation claims.[293] The court subsequently found that the legislature clearly intended to ensure that article 197 applied to causes of action that were not yet perempted or were in the process of litigation as of the June 2005 effective date.[294] Article 197 was therefore inapplicable to the perempted article 209 claims.[295] Shortly after the Third Circuit rendered the *McKay* decision, Louisiana's other appellate courts considered the same issue.[296]

Within a few months, the Louisiana First Circuit Court of Appeal granted writs in a succession case posing the same question.[297] In *Succession of Faget v. Faget*, the First Circuit followed the *McKay* decision.[298] The First Circuit similarly read the new article's enacting legislation to find that the Louisiana Legislature "does not clearly and unequivocally express an intent to have the act apply retroactively to revive a right."[299] The court determined the unfiliated child missed her opportunity to bring her filiation claim by her 19th birthday.[300] In dicta, the court observed that the Faget heirs possessed a vested right to plead the exception of peremption, and the legislature did not express any intent to deprive them of that vested property right.[301] The court implied, following *Chance*, that the vested nature of the right rendered article 197 substantive in nature.[302] The court could not apply the new law retroactively to revive perempted filiation claims because the Louisiana Legislature did not express any intention for article 197 to have a retroactive application.[303] Following the *McKay* and *Faget* decisions, the remaining circuits followed suit, applying the same rationale to find that

293. *See McKay*, 921 So. 2d at 1223; *see also* Cameron Par. Sch. Bd. v. Acands, Inc., 687 So. 2d 84 (La. 1997).

294. *McKay*, 921 So. 2d at 1223.

295. *Id.*

296. *See In re* Succession of Bailey, 82 So. 3d 322 (La. Ct. App. 5th Cir. 2011); *In re* Succession of Smith, 29 So. 3d 723, 726 (La. Ct. App. 3d Cir. 2010); *In re* Succession of James, 994 So. 2d 120, 125–26 (La. Ct. App. 1st Cir. 2008); Jeanmarie v. Butler, 942 So. 2d 578, 579 (La. Ct. App. 4th Cir. 2006); Succession of Faget v. Faget, 938 So. 2d 1003, 1007 (La. Ct. App. 1st Cir. 2006).

297. *See generally Faget*, 938 So. 2d at 1007.

298. *See generally id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

other children's claims were perempted and refusing to apply article 197.[304]

The *McKay* and *Faget* approach, which is the majority approach in the present circuit split, engenders several problems.[305] First, the *McKay* and *Faget* courts incorrectly assumed that for children to proceed with their filiation claims, article 197 must apply retroactively.[306] Neither court considered the threshold issue of whether retroactive application of article 197 was appropriate at all, which should be the first step in a Louisiana retroactivity analysis.[307] Second, the *McKay* and *Faget* courts avoided classifying article 197 as procedural or substantive and instead relied on the supposedly "clear and unequivocal" legislative intent in article 197's enacting legislation.[308] The *McKay* and *Faget* courts' argument that the legislature's intent was "clear and unequivocal" is questionable because other courts found that the exact same language did not clearly indicate the Louisiana Legislature's intent.[309] For example, the Third Circuit and the Louisiana Supreme Court found that enacting legislation identical to article 197's enacting language did not clearly indicate the legislature's

304. *See, e.g.*, *In re* Succession of Bailey, 82 So. 3d 322 (La. Ct. App. 5th Cir. 2011); *In re* Succession of Smith, 29 So. 3d 723, 726 (La. Ct. App. 3d Cir. 2010) (following *McKay* and *James* to find that the right to bring a filiation action was extinguished—that is, perempted); *In re* Succession of James, 994 So. 2d 120, 125–26 (La. Ct. App. 1st Cir. 2008) (following *McKay* and *Faget*, but noting that the time period imposed by both articles 209 and 197 are peremptive periods); Jeanmarie v. Butler, 942 So. 2d 578, 579 (La. Ct. App. 4th Cir. 2006) (following *McKay* and holding that the child's claims were extinguished—that is, perempted—under former article 209).

305. *See generally Faget*, 938 So. 2d 1003; Succession of McKay, 921 So. 2d 1219 (La. Ct. App. 3d Cir. 2006).

306. This reasoning is only partially correct. The retroactive application of article 197 would only function to revive a claim perempted by article 209; article 197 could then apply prospectively to all filiation claims arising after its 2005 effective date. *See generally* Trahan, *Time*, *supra* note 32.

307. *See id.* at 766; *see also* discussion *supra* Section I.B.

308. *See Faget*, 938 So. 2d at 1007; *McKay*, 921 So. 2d at 1222–23. Albeit in dicta, the *McKay* court indicated that it would take the *Chance* plurality approach on the issue—that is, although the legislation would normally be classified as procedural, because it affected a substantive right to plead the exception of peremption, the court classified the law as substantive and did not apply it retroactively. *McKay*, 921 So. 2d at 1222–23; *see also* Chance v. Am. Honda Motor Co., 635 So. 2d 177, 178 (La. 1994).

309. *See Faget*, 938 So. 2d at 1007; *McKay*, 921 So. 2d at 1222–23.

intent.[310] Therefore, the *Faget* and *McKay* courts should have proceeded to the second step in an article 6 analysis and should have classified article 197 as procedural, substantive, or interpretative.[311]

Third, both courts conflated peremptive and prescriptive periods as well as the rules and the cases that govern them.[312] For example, the courts observed that article 209 imposed a peremptive period but proceeded to cite cases concerning the retroactivity of prescriptive periods.[313] The courts' reliance on jurisprudence governing prescriptive periods is incorrect because the doctrines of peremption and prescription are not the same.[314] Under the general peremption rules, once a claim is perempted, that claim dies.[315] The courts should have clearly asserted that point because the expiration of the former article's peremptive period extinguished the filiation claims; thus, retroactive application of article 197 to revive those extinguished claims was out of the question in the absence of legislative expression.[316] A court's retroactive application of article 197 to revive claims perempted under article 209 could not solve the problem posed by article 209's peremptive period because the doctrine of *causae finitae* prevents courts from reviving extinguished claims.[317] Louisiana courts simply do not have the power to revive extinguished claims.[318]

More recently, the Second Circuit's 2012 decision in *Thomas v. Roberts* and the Third Circuit's 2014 decision in *Meaux v. Guidry* extended the *Faget* and *McKay* rationales.[319] The Second and Third

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310. Succession of Pelt, 244 So. 3d 476, 482 (La. Ct. App. 3d Cir. 2018) (citing Mallard Bay Drilling, Inc. v. Kennedy, 914 So. 2d 533, 543 (La. 2005)).

311. *See* discussion *supra* Section I.B.

312. *See, e.g.*, *McKay*, 921 So. 2d at 1222–23.

313. *See, e.g.*, *Faget*, 938 So. 2d at 1007; *see also Chance*, 635 So. 2d 177.

314. *See* discussion *supra* Section I.C.

315. *See* Gelpi, *supra* note 201, at 259; Richardson, *supra* note 32, at 1188.

316. *See* Richardson, *supra* note 32, at 1212–13.

317. *See generally id.*; *see also* Hulin v. Fibreboard Corp., 178 F.3d 316, 323 (5th Cir. 1999).

318. *See id.*

319. *See generally* Meaux v. Guidry, 140 So. 3d 871, 874 (La. Ct. App. 3d Cir. 2014); Thomas v. Roberts, 106 So. 3d 557 (La. Ct. App. 2d Cir. 2012). The Second Circuit's decision in *Washington v. Magnolia Manor Nursing Home* is distinguishable from *Meaux* and *Thomas*. In *Washington*, the court considered whether an unfiliated son could bring a wrongful death and survival action after he turned 19 but within one year of his father's death. Washington v. Magnolia Manor Nursing Home and Rehab., 247 So. 3d 156, 159 (La. Ct. App. 2d Cir. 2018). The Second Circuit concluded that the article 2315 exception, added to article 209 in 1984, applied to the child's claims. His filiation action, therefore,

Circuits found that article 209 perempted all attempts to filiate, including filiation claims brought outside of a succession context.[320] In both cases, the unfiliated children brought their filiation claims prior to their fathers' deaths.[321] Following *McKay* and *Faget*, the *Thomas* and *Meaux* courts found that the children could not institute filiation actions in any context because their claims were perempted when they turned 19.[322] Even though the children's fathers were not deceased in either case, the courts prevented the children from instituting filiation actions and refused to apply article 197.[323] The *Thomas* and *Meaux* courts declined to allow children over age 19 an opportunity to filiate, even though article 197 abolished the time and age limitations on filiation actions outside of the succession context.[324] The courts thus implemented a harsh extension of the *McKay* and *Faget* rationale.[325]

The majority approach to article 197 is also flawed because it supports a policy rationale that favors the timely disposition of property and the stability of title in successions cases over the rights of children born out of wedlock.[326] For filiation actions outside of a succession context, however, the policy rationale for applying article 209's short time limit is even more inequitable.[327] Continuing to apply pre-2005 law that perpetuates the differentiation between children born out of wedlock and children born to married parents on such thin policy justifications is not ideal.[328] Louisiana courts should be hesitant to enforce the "harsh result" of article 209 because modern policy does not support imposing a time period based solely on a child's age under the pretext that 19 years is enough time for a child to timely institute filiation proceedings.[329] When the Louisiana Legislature replaced article 209 with article 197, it sought to promote equity and policy considerations.[330] The legislature's 2005 removal and

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was never time-barred by article 209(C). *Id.* at 161; *see also* LA. CIV. CODE art. 209(C) (2005).

320. *See generally Meaux*, 140 So. 3d at 874; *Thomas*, 106 So. 3d 557.

321. *See Meaux*, 140 So. 3d 871; *Thomas*, 106 So. 3d 557.

322. *Meaux*, 140 So. 3d at 873–74; *Thomas*, 106 So. 3d at 560.

323. *Meaux*, 140 So. 3d at 873–74; *Thomas*, 106 So. 3d at 560.

324. *See Meaux*, 140 So. 3d at 873–74; *Thomas*, 106 So. 3d at 560.

325. *See generally Meaux*, 140 So. 3d at 873–74; *Thomas*, 106 So. 3d at 560.

326. *See generally* LA. CIV. CODE ANN. art. 197 cmt. e (2018); Succession of Grice, 462 So. 2d 131, 135–36 (La. 1985).

327. *See generally* LA. CIV. CODE ANN. art. 197 cmt. e (2018); *Grice*, 462 So. 2d at 135–36.

328. *See generally* LA CIV. CODE art 209 (2005).

329. *See* Succession of Pelt, 244 So. 3d 476, 484 (La. Ct. App. 3d Cir. 2018); *see also Grice*, 462 So. 2d at 135–36.

330. *See Pelt*, 244 So. 3d at 484.

replacement of article 209 undoubtedly promoted a more reasonable opportunity for children born out of wedlock to pursue a filiation action.[331] The majority approach fails to adequately explain how enforcing a rigid time limitation based exclusively on a child's age promotes the timely disposition of property or the stability of land titles in situations where a child seeks filiation for non-succession purposes.[332] Nevertheless, appellants have presented creative arguments to the courts that subscribe to the majority approach in an attempt to achieve more equitable results.[333]

B. The Fifth Circuit Enters the Fray

In *In re Succession of Bailey*, the Louisiana Fifth Circuit Court of Appeal considered two novel arguments regarding article 209's peremption rule.[334] The appellants argued that because article 197 removed article 209's age requirement and article 197 does not explicitly provide for retroactive application, the Louisiana Legislature created a gap in the law for filiation claims.[335] According to the appellants, Louisiana courts should fill this purported gap in legislation with principles of equity.[336] The appellants argued that the trial court erred "when it filled in the gap in legislation" created by articles 209 and 197 "with judicial decisions instead of using the principles of equity."[337] In the alternative, the *Bailey* appellants argued that they should prevail on equitable estoppel grounds because they relied to their detriment on the fact that the decedent was their father.[338]

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331. *See* discussion *supra* Section I.A.3; *see generally* LA. CIV. CODE ANN. art. 197 cmt. e (2018); *Grice*, 462 So. 2d at 135–36.

332. *See generally* LA. CIV. CODE ANN. art. 197 cmt. e (2018); *Grice*, 462 So. 2d at 135–36.

333. *See, e.g.*, *In re* Succession of Bailey, 82 So. 3d 322 (La. Ct. App. 5th Cir. 2011).

334. *See generally id.*

335. *Id.* at 325.

336. *Id.* The appellants relied on Louisiana Civil Code article 4, which provides: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." LA. CIV. CODE art. 4 (2018).

337. *Bailey*, 82 So. 3d at 325; *see also* LA. CIV. CODE art. 4.

338. *Bailey*, 82 So. 3d at 326. Specifically, the appellants contended that their purported father represented that he was their father through his conduct by claiming they were his children on legal documents as well as providing food and care for them; they justifiably relied on his representation that he was their father;

The Fifth Circuit did not find merit in either of the appellants' arguments and instead followed the *McKay* and *Faget* approach.[339] The court maintained that no gap existed between articles 209 and 197.[340] Article 209 perempted the appellants' claims, which meant that the court did not need to proceed according to equity.[341] Also, the Fifth Circuit found that the equitable estoppel claim could not prevail against article 209 because "the application of equitable estoppel in this matter is not justified."[342]

The *Bailey* appellants' equity argument is certainly a fresh perspective on a complex issue.[343] Their approach is nevertheless problematic because the appellants assume that a temporal gap exists in the law between articles 209 and 197.[344] Prospective application of article 197 immediately followed the repeal of 209, preventing any gap.[345] The appellants' argument falls flat because, as the court indicated in dicta, positive law should precede a resort to equity.[346] Here, articles 209 and 197 prevent a gap in the law because there was no lapse in coverage once article 209 was repealed and article 197 became effective; thus, equitable principles should not be used to circumvent the existing legislation.[347]

An equity-based approach also fails because it does not provide a path around the peremption problem.[348] Any attempted jurisprudential solution must contend with the *causae finitae* issue, and Louisiana doctrine and jurisprudence do not provide that courts may revive perempted claims.[349] As only the Louisiana Legislature may revive perempted claims, both the *Bailey* case and the recent Second and Third Circuit cases demonstrate

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and as a result, their position changed to their detriment because they were unable to inherit. *Id.*

339. *Id.* at 325 (citing *In re* Succession of Smith, 29 So. 3d 723, 726 (La. Ct. App. 3d Cir. 2010)); *see also In re* Succession of James, 994 So. 2d 120, 125–26 (La. Ct. App. 1st Cir. 2008).

340. *Bailey*, 82 So. 3d at 325.

341. *Id.*

342. *Id.* at 326 (asserting in dicta that equitable estoppel is a "doctrine of last resort" and that equity should not prevail when it conflicts with positive law, here, article 209).

343. *See id.* at 325; *see also* LA. CIV. CODE art. 4 (2018).

344. *See* Richardson, *supra* note 32, at 1216–18.

345. *See Bailey*, 82 So. 3d at 325; LA. CIV. CODE art. 4; *see also* Richardson, *supra* note 32, at 1216–18.

346. *See Bailey*, 82 So. 3d at 325; *see also* LA. CIV. CODE art. 4.

347. *But see Bailey*, 82 So. 3d at 326.

348. *See* Richardson, *supra* note 32, at 1216–18.

349. *See generally* Hulin v. Fibreboard Corp., 178 F.3d 316, 323 (5th Cir. 1999).

Louisiana courts' inability to overcome the doctrinal and jurisprudential impediments surrounding this body of law.[350]

C. Retroactive by Association Approach

In 2016, the Second Circuit's decision in *Succession of Younger* invented a "retroactive by association" approach to retroactivity.[351] Based on the text of article 197, the *Younger* court concluded that the Louisiana Legislature intended for courts to read article 197 in conjunction with the Civil Code articles governing successions.[352] To be precise, the Second Circuit read article 197 *in pari materia*[353] with article 870(B), the succession article providing that succession rights are governed by the law in effect at the time of the decedent's death.[354] The court determined that because the enacting legislation for article 870 provided for it to "apply both prospectively and retroactively," article 197 should apply retroactively as well.[355] Reading article 197 with article 870(B) required the court to apply the law in effect at the time of the decedent's death.[356] The father in *Younger* died in 2015, and the law in effect at that time was article 197.[357] According to the court, the child's filiation action was therefore timely under article 197 because she filed her filiation action within a year of her father's death.[358]

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350. *See* discussion *supra* Section I.C.

351. *See generally* Succession of Younger, 206 So. 3d 1088 (La. Ct. App. 2d Cir. 2016).

352. Article 197 provides that its peremptive period applies "for purposes of succession only." LA. CIV. CODE art. 197 (2018). Due to this succession reference, the *Younger* court asserted that the Louisiana Legislature enacted article 197 "in light of the laws governing successions." *Younger*, 206 So. 3d at 1092; *see also* LA. CIV. CODE art. 197.

353. The Louisiana Civil Code provides for the *in pari materia* principle of statutory construction: "Laws on the same subject matter must be interpreted in reference to each other." LA. CIV. CODE art. 13; Lamonica & Jones, *supra* note 87, § 7.7, at 149–51.

354. *Younger*, 206 So. 3d at 1092; LA. CIV. CODE art. 870(B); *see also* discussion *supra* Section I.A.2.

355. *Younger*, 206 So. 3d at 1092; *see also* Act No. 560 § 3, 2001 La. Acts 1169, 1170. The *Younger* court confounded the issue of whether article 197 should be applied retroactively or prospectively. *See Younger*, 206 So. 3d at 1092.

356. *See Younger*, 206 So. 3d at 1092; *see also* LA. CIV. CODE arts. 197, 870(B).

357. *See Younger*, 206 So. 3d at 1092; *see also* LA. CIV. CODE art. 197.

358. *Younger*, 206 So. 3d at 1092; LA. CIV. CODE art. 197.

In 2018, the Third Circuit followed *Younger* in *Succession of Pelt*.[359] Before reaching the same conclusion as *Younger*, the Third Circuit bolstered the retroactivity by association approach with intriguing dicta.[360] First, the court considered other cases in which the Louisiana Supreme Court held that parallel enacting language to article 197's enacting legislation clearly indicated the legislature's intent to apply new legislation retroactively.[361] Second, the court considered the policy implications of continuing to enforce the "harsh result" of article 209, arguing that modern policy does not justify imposing such a restrictive time period based almost entirely upon an unfiliated child's age.[362] The Louisiana Legislature replaced article 209 with article 197 to promote equity and policy considerations.[363] According to *Pelt*, the time limit that former article 209 imposed on all filiation claims was a "harsh result not justified by any policy consideration."[364] Applying article 197, by contrast, promoted the general policy of treating all children equally under Louisiana law.[365] In light of the policy considerations, the court asserted that the majority approach disingenuously imposed article 209 on children who brought filiation actions after article 197's effective date.[366]

Third, the *Pelt* court discussed the often-raised vested rights argument.[367] The court dismissed the arguments of prior courts that the decedent's legal heirs acquired a vested right to plead the exception of peremption when an unfiliated child turned 19.[368] The court defined vested rights as the right "to enjoyment, present or prospective," which "has

359. Succession of Pelt, 244 So. 3d 476, 485 (La. Ct. App. 3d Cir. 2018) (holding that article 197 should apply "retroactively" *in pari materia* with article 870(B)). Like the *Younger* court, the *Pelt* court confused the issue of whether article 197 would apply retroactively or prospectively to the child's filiation claim. *See id.*

360. *See generally id.*

361. *Id.* at 482 (citing Mallard Bay Drilling, Inc. v. Kennedy, 914 So. 2d 533, 543 (La. 2005)).

362. *See id.* at 484.

363. *See id.*

364. *Id.*; *see also* LA. CIV. CODE ANN. art. 197 cmt. e (2018). The policy behind article 209's restrictive peremptive period was likely to facilitate the orderly and timely disposition of estates, as well as the stability of land titles. The Louisiana Legislature carried this policy motivation into article 197, indicated by the retention of a peremptive period for succession purposes. *See* LA. CIV. CODE ANN. art. 197 cmt. e.

365. *See Pelt*, 244 So. 3d at 484.

366. *See id.*

367. *See id.*

368. *Id.*

become the property of some particular person or persons as a present interest."[369] A vested right must be "absolute, complete and unconditional, [and] independent of a contingency."[370] The court stated that the alleged father acquired a vested right to plead the exception of peremption on his unfiliated child's 19th birthday.[371] The heirs had no interest in the child's filiation action or any interest in the succession until after their father's death.[372] The court concluded that the heirs could not have a vested right before the death of their father.[373] As the heirs could not have asserted an exception of peremption at any time *prior* to their father's death, the court opined that the heirs clearly did not have a vested right under Louisiana law.[374]

The *Pelt* and *Younger* courts' efforts to subvert the article 197 peremption problem are deeply flawed.[375] Louisiana doctrine simply does not support the *Pelt* court's rationale.[376] One glaring issue unique to the *Pelt* decision was the court's assertion that the father's vested right to plead the exception of peremption was distinct from his heirs' rights to plead the exception of peremption.[377] Louisiana doctrine, however, posits

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369. *Id.* at 485 (quoting with approval W.R.M. v. H.C.V., 951 So. 2d 172, 175–76 (La. 2007) (per curiam) (Johnson, J., concurring) (quoting Sawicki v. K/S Stavanger Prince, 802 So. 2d 598, 604 (La. 2001))).

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* ("A succession cannot exist before the death of the deceased, and, therefore, a potential heir cannot have a right or vested claim before that time.").

374. *Id.*

375. *See generally id.*; Succession of Younger, 206 So. 3d 1088, 1092 (La. Ct. App. 2d Cir. 2016).

376. *See* Trahan, *Filiation*, *supra* note 40, at 444 n.89.

377. This dictum erroneously implied that the father's right to plead the exception of peremption was strictly personal. *See Pelt*, 244 So. 3d at 485. An obligation is "strictly personal" when its performance can only be enforced by the parties to a juridical act. *See* LA. CIV. CODE art. 1766 (2018). For example, the obligation to fulfill an engagement is strictly personal, and if a party to the engagement contract dies before fulfilling the engagement, the right of action dies with that party. LA. CIV. CODE ANN. art. 1766 cmt. c (2018). Conversely, an obligation is "heritable" when a successor in a party's right may enforce the right of the obligor; thus, a heritable obligation is transferable between parties. *See* LA. CIV. CODE art. 1765 (2018). In the civil law, obligations are presumptively heritable. *See id.* French doctrine supports the notion that actions concerning a person's status, like filiation, are heritable under Louisiana law. Trahan, *Filiation*, *supra* note 40, at 444 n.89 (citing LAURENT, 3 PRINCIPLES DE DROIT CIVIL FRANÇAIS 435, 549 (2d ed. 1876)).

that the right to filiate is heritable.[378] By analogy, the right to prevent a filiation action by pleading the exception of peremption would also be heritable.[379] When the father died, his heirs inherited his right to plead the exception of peremption because his heirs inherited his legal estate, which includes all of the property, rights, and obligations that their father left behind after his death.[380] Thus, the heirs' and the father's right to plead the exception of peremption is actually the same right.[381]

Aside from the heritability problem, the main issue with the *Younger* and *Pelt* approach to retroactivity of laws is that the courts chart an unprecedented route to achieve a "retroactive" result, a route not founded in prior legislation, jurisprudence, or doctrine.[382] Either due to confusion or in an attempt to evade retroactivity rules, both the *Pelt* and *Younger* courts argued for a retroactive application of article 197 when the application the courts intended necessarily applied prospectively.[383] As the fathers in both cases died after 2005, the effective law was article 197.[384] The real problem with the courts' rationales is that both courts attempted to revive perempted claims by contending that article 197 should be interpreted to retroactively revive perempted filiation claims.[385] Louisiana's doctrine of *causae finitae*, however, prevents courts from reviving such perempted claims.[386] In essence, no matter how the Second and Third Circuits sought to contort around Louisiana's doctrines of retroactivity and peremption, they should have reached the same inevitable conclusion: Courts do not have the power to revive perempted claims.[387]

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378. *See* Trahan, *Filiation*, *supra* note 40, at 444 n.89.

379. *See id.*

380. *See id.*; LA. CIV. CODE art. 872 ("The estate of a deceased means the property, rights, and obligations that a person leaves after his death . . . . The estate includes not only the rights and obligations of the deceased as they exist at the time of death, but all that has accrued thereto since death . . . .").

381. *See* Trahan, *Filiation*, *supra* note 40, at 444 n.89.

382. Prior to *Pelt* and *Younger*, Louisiana courts entertained the idea of reviving prescribed or perempted causes of actions, but they declined to do so in the absence of clear legislative intent. Janke, *supra* note 239, at 536 (collecting cases, including *Chance*, *Faget*, and *McKay*). Previously, no Louisiana court had ever explicitly interpreted a legislative act as reviving a prescribed or perempted claim. *See id.*

383. *See* Succession of Pelt, 244 So. 3d 476, 485 (La. Ct. App. 3d Cir. 2018); Succession of Younger, 206 So. 3d 1088, 1092 (La. Ct. App. 2d Cir. 2016).

384. *See generally Pelt*, 244 So. 3d 476; *Younger*, 206 So. 3d 1088.

385. *See Pelt*, 244 So. 3d at 485; *Younger*, 206 So. 3d at 1092; *see also* Richardson, *supra* note 32, at 1216–18.

386. *See, e.g.*, Hulin v. Fibreboard Corp., 178 F.3d 316, 323 (5th Cir. 1999).

387. *See* discussion *supra* Section I.B–C.

The courts' reasoning derogates from other accepted Louisiana doctrines as well.[388] The Civil Code articles on filiation and succession are not "on the same subject matter," contrary to the courts' assumptions.[389] The enacting legislation for article 870(B), a succession article, should therefore not apply to the unrelated filiation article 197.[390] In addition, applying article 197 only to revive filiation claims for succession purposes does not resolve the issue of whether article 197 applies to other filiation claims.[391] The *Pelt* and *Younger* decisions are distinguishable from cases that held that article 209 perempted other filiation claims, and, therefore, the retroactive by association approach is not a unified solution to the article 197 problem.[392]

Beyond their peculiar and flawed approaches to retroactivity, *Younger* and *Pelt* are a step toward achieving a just result that allows children born out of wedlock to inherit from their fathers even though they failed to bring filiation actions before their 19th birthdays.[393] Louisiana's courts have tried and failed to properly apply retroactivity and peremption rules to articles 197 and 209.[394] A jurisprudential solution simply does not work.[395] Louisiana children born out of wedlock will only have an fair chance at inheritance if the Louisiana Legislature acts to reconcile article 197 with the existing doctrines of peremption and retroactivity.[396]

III. TIME TO AMEND ARTICLE 197

Articles 197 and 209 pose a unique problem in Louisiana law because the articles exemplify all that is wrong with Louisiana's law of peremption and retroactivity.[397] The existing deficiencies in the law make achieving a just result difficult.[398] For certain children to have a right to filiate, they must overcome former article 209; furthermore, Louisiana's laws of

388. *See* discussion *supra* Section I.A.2.

389. *See* LA. CIV. CODE art. 13 (2018); *see also* Lamonica & Jones, *supra* note 87, § 7.7, at 149–51.

390. *See generally* Act No. 560 § 3, 2001 La. Acts 1169, 1170; LA. CIV. CODE arts. 197, 870(B) (2018).

391. *See generally* Meaux v. Guidry, 140 So. 3d 871, 873–74 (La. Ct. App. 3d Cir. 2014); Thomas v. Roberts, 106 So. 3d 557, 560 (La. Ct. App. 2d Cir. 2012).

392. *See generally Meaux*, 140 So. 3d at 873–74; *Thomas*, 106 So. 3d at 560.

393. *See generally* Succession of Pelt, 244 So. 3d 476, 485 (La. Ct. App. 3d Cir. 2018); *In re* Succession of Bailey, 82 So. 3d 322 (La. Ct. App. 5th Cir. 2011).

394. *See generally* discussion *supra* Part II.

395. *See generally* discussion *supra* Part II.

396. *See* discussion *infra* Part III.

397. *See generally* Richardson, *supra* note 32; Trahan, *Time*, *supra* note 32.

398. *See* Richardson, *supra* note 32, at 1213 n.219.

peremption and retroactivity are structured in a way that is formidable for children born out of wedlock to overcome.[399] An equitable and theoretically sound result is possible, but only if the Louisiana Legislature steps in to correct the wrongs wrought by an extremely problematic body of law.[400] Only the legislature can revive claims perempted under article 209.[401] An amendment to article 197 is thus necessary to make both the law and the legislature's intent clear.[402]

A. Proposal to Amend Article 197

In the absence of a compelling and legally sound jurisprudential solution, the Louisiana Legislature should amend article 197 to revive claims perempted by article 209.[403] The article proposed in this Comment will help to ameliorate intertemporal conflicts of law in future revisions to the Code.[404] The most economical way for the Louisiana Legislature to amend article 197 is to incorporate language similar to that found in a transitional statute.[405] In other words, the legislature must explicitly provide that article 197 applies—after a specific point in time—to *all* filiation claims, with the exception of the cases already resolved by a final judgment.[406] The amended article is thus limited to filiated claims not yet

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399. *See id.*

400. *See* discussion *infra* Part III.

401. *See generally* GHESTIN & GOUBEAUX, *supra* note 242, at 415; ROUBIER, *supra* note 95, at 32 (noting that *causae finitae* is the default rule in the civil law tradition, applying only in the absence of the legislature's express intent to revive extinguished causes of action); *see also* discussion *supra* Section I.C.3–4.

402. *See generally* ROUBIER, *supra* note 95, at 32.

403. *See generally* GHESTIN & GOUBEAUX, *supra* note 242, at 415; ROUBIER, *supra* note 95, at 32.

404. *See generally* Richardson, *supra* note 32.

405. The Louisiana Legislature has previously enacted transitional statutes to ease the adjustment process following changes in succession law. *See* Kelly Grieshaber Dunn, *Forced Heirship Lives: The Effects of Louisiana Revised Statute Title 9, Section 2501*, 46 LOY. L. REV. 619, 620 (2000); *see also* Succession of Boyter, 756 So. 2d 1122, 1123 (La. 2000). Following major changes to Louisiana's forced heirship laws, the legislature enacted transitional provisions to address the issue of which law applied at a given time. *See, e.g.*, LA. REV. STAT. § 9:2501 (1997); *see also* Lorio, *supra* note 6, § 10.15, at 359. For example, Louisiana Revised Statutes § 9:2501 provided rules for interpreting testaments written before the change in Louisiana's forced heirship laws. *See* JOSEPH A. PROKOP, JR., 1 LOUISIANA SUCCESSIONS § 16.01[4] (3d ed. 2018).

406. Such a statutory form resembles a transitional statute. *See, e.g.*, LA. REV. STAT. § 9:2501 (1997); *see also* Lorio, *supra* note 6, § 10.15, at 359. The doctrine

litigated.[407] Therefore, the Louisiana Legislature should amend article 197 to add the italicized paragraph:

> A child may institute an action to prove paternity even though he is presumed to be the child of another man. If the action is instituted after the death of the alleged father, a child shall prove paternity by clear and convincing evidence.
>
> For the purposes of succession only, this action is subject to a peremptive period of one year. This peremptive period commences to run from the day of the death of the alleged father.
>
> *The provisions of this Article became effective on June 25, 2005, and shall apply to all filiation actions instituted or pending after that date, including those actions perempted under former Civil Code Article 209.*

With this amendment, the Louisiana Legislature would clarify that the article retroactively revives claims perempted under 209 and that the new law governs *all* filiation claims arising after article 197 became effective in June 2005.[408] This legislative solution also avoids the unjust results

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of res judicata, embodied in Louisiana Revised Statutes § 13:4231, provides that a valid and final judgment is generally conclusive between the same parties. *See* LA. REV. STAT. § 13:4231 (1991); *see also* Maraist, *supra* note 242, § 4.3, at 52–53. The cases discussed in this Comment, therefore, would be subject to res judicata principles, and the proposed legislative amendment would not act to revive those parties' claims. *See* Lamonica & Jones, *supra* note 87, § 6.4, at 127–28.

407. *See generally* LA. REV. STAT. § 13:4231 (1991); Maraist, *supra* note 242, § 4.3, at 52–53. Opening previously disposed cases would create additional problems beyond the scope of this Comment. If the amendment expressly provided for the reopening of closed cases, Louisiana's courts would face the practical problem of contending with those cases a second time. Beyond the practical concerns, opening these cases would contravene the doctrine of res judicata. *See supra* note 406; *see also* Maraist, *supra* note 242, § 4.3, at 52–53. Generally, the doctrine serves the policy goals of discouraging unnecessary litigation and protecting the parties' reliance on the resolved ruling. Hall, *supra* note 98, at 604. For example, if Karla's case was reopened today, after the succession proceedings closed more than 10 years ago, the court would have to determine how to reallocate Louis's estate, potentially taking property from Louis Jr. Another practical problem is that Louis Jr. might have disposed of his portion of the estate, leaving no property for Karla to inherit. Such an application would have additional due process ramifications. *See generally* discussion *supra* Section I.B–C.

408. *See generally* discussion *supra* Section I.C.

Louisiana courts reached.[409] The amended article provides a fair opportunity for children born out of wedlock to timely institute a filiation action within one year of their fathers' deaths.[410] Instead, children like Karla would have a reasonable prospect of inheriting from their fathers, rather than inheriting nothing pursuant to a strict, antiquated regime.[411] Moreover, the amended article equally applies to situations in which article 209 perempted filiation claims outside of the succession context, unlike the recent retroactive by association court decisions.[412] Amended article 197, therefore, successfully applies a just rule to all children born to unmarried parents who seek to inherit from their fathers.[413]

As the number of children born out of wedlock makes up such a substantial portion of Louisiana's population, and especially as their fathers age, these cases will continue to vex Louisiana's courts.[414] Courts will continue to struggle with the question posed by articles 197 and 209, leaving the courts to either choose to follow arcane policy justifications that promote the efficient and stable disposition of property, or otherwise craft theoretically unsound jurisprudence that would achieve a fair result for children born out of wedlock.[415] A legislative solution is not only necessary to resolve this issue, but also imperative to prevent further muddling of Louisiana's legal doctrine and to curb discord among Louisiana's appellate courts.[416] The Louisiana Legislature must recognize that it is finally time to preference children over property and that removing the last traces of a peremptive period based on an arbitrary birthdate will achieve the justice long sought but often denied to so many of Louisiana's children.[417]

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409. *Cf.* Succession of Pelt, 244 So. 3d 476 (La. Ct. App. 3d Cir. 2018); *In re* Succession of Bailey, 82 So. 3d 322 (La. Ct. App. 5th Cir. 2011).

410. *Cf. In re* Succession of Smith, 29 So. 3d 723 (La. Ct. App. 3d Cir. 2010); *In re* Succession of James, 994 So. 2d 120 (La. Ct. App. 1st Cir. 2008); *In re* Succession of Faget, 938 So. 2d 1003 (La. Ct. App. 1st Cir. 2006); *In re* Succession of McKay, 921 So. 2d 1219 (La. Ct. App. 3d Cir. 2006).

411. *See generally In re* Succession of Hebert, 153 So. 3d 1101 (La. Ct. App. 3d Cir. 2014).

412. *Cf. Pelt*, 244 So. 3d 476; Succession of Younger, 206 So. 3d 1088 (La. Ct. App. 2d Cir. 2016).

413. *Cf. Pelt*, 244 So. 3d 476; *Younger*, 206 So. 3d 1088.

414. *See* discussion *supra* Part II.

415. *See* discussion *supra* Part II.

416. *See* discussion *supra* Parts I–II.

417. *See* discussion *supra* Parts I–II.

B. Ameliorating Retroactivity Concerns

The proposed change to the law presents potential retroactivity issues; however, due to the nature of filiation, the amended article evades such doctrinal problems.[418] Under Louisiana's cumbersome law of retroactivity, vested rights are always at the heart of the analysis.[419] The threshold issue is whether a retroactive application will occur at all.[420] Here, the question is whether article 197 impairs a father and his heirs' vested right to oppose an unfiliated child bringing a filiation action.[421] Amending article 197 will not sour a Louisiana vested rights analysis because the amendment does not affect vested rights.[422]

The amended article 197 does not divest a father of any vested right.[423] Again, vested rights are patrimonial rights, susceptible of monetary evaluation, and are also present rights.[424] Filiation, however, is predominately an extra-patrimonial right because it concerns the legal relationship between a child and parent, and, moreover, filiation is also an expectant right.[425] The civilian tradition does not consider personal rights or family rights as patrimonial.[426] Although the civil effects of filiation—including the rights to support, to inherit, and to sue for wrongful death—are patrimonial in nature, filiation itself is principally an extra-patrimonial right and, thus, not a vested right.[427] Albeit, the parent–child relationship includes some aspects that may be susceptible of pecuniary value, such as the right to child support, the connection between the extra-patrimonial filiation and its patrimonial civil effects is too attenuated.[428]

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418. *See generally* Trahan, *Time*, *supra* note 32.

419. *See generally id.*

420. *See id.* at 687.

421. *Cf.* W.R.M. v. H.C.V., 951 So. 2d 172, 177–78 (La. 2007) (per curiam) (Johnson, J., concurring).

422. *See* discussion *supra* Section I.B.

423. *See generally* Trahan, *Time*, *supra* note 32, at 690; *see also* LITVINOFF & TÊTE, *supra* note 110, at 140.

424. *See* discussion *supra* Section I.B; *see also* Trahan, *Time*, *supra* note 32, at 690; LITVINOFF & TÊTE, *supra* note 110, at 140.

425. *See* discussion *supra* Section I.B; *see also* Trahan, *Filiation*, *supra* note 40, at 388 n.1 (citing CORNU, *supra* note 40, at 313).

426. *See* LITVINOFF & TÊTE, *supra* note 110, at 140.

427. *See generally* LA. CIV. CODE ANN. art. 197 cmt. a (2018); *see also* LITVINOFF & TÊTE, *supra* note 110, at 140.

428. *See generally* LITVINOFF & TÊTE, *supra* note 110, at 140; *cf.* W.R.M. v. H.C.V., 951 So. 2d 172, 177–78 (La. 2007) (per curiam) (Johnson, J., concurring).

Moreover, the civilian concept of patrimony is consistent with the American common law notion of vested property rights.[429] Constitutional due process considerations involve only the divestiture of property rights—that is, the loss of title to real or personal property.[430] The right to filiate is also not absolute or independent of contingency as required under a vested rights analysis because filiation is not a present right.[431] Buying into the Louisiana vested rights analysis necessitates the conclusion that a father cannot have a vested right to prevent a child from establishing an extra-patrimonial relationship with him.[432]

Recall that the vested rights inquiry appears at three points in the Louisiana retroactivity analysis. Regardless of where the proposed article enters the retroactivity analysis, the article will never affect vested rights because filiation is extra-patrimonial in nature.[433] First, the amended article poses no retroactive application because article 197, as amended, does not impact vested rights.[434] Because the proposed article 197 does not impair a vested right, it does not apply retroactively, passing the threshold inquiry.[435] Second, even if the proposed article called for a retroactive application, the legislative intent that the article should revive perempted claims is express.[436] Under article 6, therefore, classification is unnecessary.[437] The third stage in the analysis is the constitutional due process issue.[438] Due process is not violated unless the article unconstitutionally divests a property right.[439] Again, the proposed statute does not disturb vested property rights; therefore, it cannot be an unconstitutional divestment of the father or his heirs' constitutional rights.[440]

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429. *See* discussion *supra* Section I.C.4.

430. *See generally* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311 (1945); *see* discussion *supra* Section I.C.4.

431. *See* discussion *supra* Section I.B; *see also* Trahan, *Time*, *supra* note 32, at 690; *cf. W.R.M.*, 951 So. 2d at 177–78 (Johnson, J., concurring) (noting that a father does not have a vested right to establish his legal relationship to his alleged child in an avowal action because the right of avowal is not absolute).

432. *Cf. W.R.M.*, 951 So. 2d at 177–78 (Johnson, J., concurring).

433. *See generally* LITVINOFF & TÊTE, *supra* note 110, at 140.

434. *See* discussion *supra* Section I.B.

435. *See* discussion *supra* Section I.B.

436. *See* discussion *supra* Section I.B.

437. *See* discussion *supra* Section I.B.

438. *See* Lamonica & Jones, *supra* note 87, § 6.4, at 116.

439. *See* Hall, *supra* note 98, at 617.

440. *Cf.* W.R.M. v. H.C.V., 951 So. 2d 172, 177–78 (La. 2007) (per curiam) (Johnson, J., concurring).

In short, because the right to filiate is an extra-patrimonial, expectant right, it never implicates a constitutional concern and does not affect vested rights at any stage in a Louisiana retroactivity analysis.[441] Beyond the retroactivity concerns, the amended article 197, in reviving extinguished filiation claims, does not violate the civilian principle of *causae finitae*.

C. Causae Finitae *Is Not a Barrier*

The proposed amendment also avoids the general *causae finitae* rule that new legislation cannot revive extinguished claims.[442] Civilian scholars recognize that legislatures are empowered to change the default rule by expressly providing for the revival of extinguished claims.[443] Louisiana law differs from modern civilian approaches to *causae finitae* because Louisiana's notion of *causae finitae* is melded with constitutional due process concerns about impairing vested rights, which places Louisiana law in line with American jurisprudence on the issue.[444] American jurisprudence, like the civilian notions of *causae finitae*, does not run counter to the proposed article because the change to the law does not impair a vested property right.[445] The United States Supreme Court recognizes the power of state legislatures to revive extinguished claims, leading to the same result, and other common law courts permit legislatures to retroactively revive claims extinguished by a statute of repose or limitations as long as parties' vested property rights are not impaired.[446] Under civilian and common law principles, the proposed article is an appropriate exercise of legislative power.[447] Amending article 197 is the only way that Louisiana can properly resolve the peremption problem that article 209 poses in a theoretically sound manner.[448]

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441. *See* Hall, *supra* note 98, at 617 (citing Bourgeois v. A.P. Green Indus., 783 So. 2d 1251, 1259 (La. 2001)).

442. *See, e.g.*, Hulin v. Fibreboard Corp., 178 F.3d 316, 323 (5th Cir. 1999).

443. *See generally* ROUBIER, *supra* note 95, at 32.

444. *See, e.g.*, *Hulin*, 178 F.3d at 323.

445. *See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); *see also* discussion *supra* Section I.C.4.

446. *See generally Chase*, 325 U.S. 304; Campbell v. Holt, 115 U.S. 620 (1885); Int'l Union of Elec., Radio, and Mach. Workers v. Robbins & Myers, Inc., 429 U.S. 229, 243–44 (1976); *see also* discussion *supra* Section I.C.4.

447. *See* discussion *supra* Section I.C.3–4.

448. *See* discussion *supra* Section I.B–C.

CONCLUSION: AT THE CROSSROADS OF RETROACTIVITY AND PEREMPTION

Amending article 197 will allow children like Karla an equal opportunity to inherit from their fathers.[449] In a state where most children are born out of wedlock, Louisiana needs a solution that will allow *every* child a fair chance to inherit, regardless of her parents' marital status at the time of her birth.[450] Only a legislative solution can resolve the disparities in Louisiana law in a doctrinally consistent manner.[451] Leaving Louisiana's courts to resolve the problem will either accomplish an unjust result for children born out of wedlock or effect a theoretically unsound answer to an already complex legal problem.[452] Without a legislative amendment to article 197, the shaky foundation of retroactivity and peremption jurisprudence will continue to lead courts and attorneys astray.[453] Articles 197 and 209 should be cautionary tales to Louisiana's legislators, judges, and scholars.[454] Legislation that fails to consider the complexities of Louisiana's retroactivity and peremption laws will continue to produce muddled jurisprudence, leaving only legislative action to clarify the state of the law and resolve the inequities.[455]

449. *See* discussion *supra* Section III.A; *see generally In re* Succession of Hebert, 153 So. 3d 1101 (La. Ct. App. 3d Cir. 2014).

450. *See* MARTIN ET AL., *supra* note 16, at 5.

451. *See* discussion *supra* Part III.

452. *See* discussion *supra* Section II.A–C.

453. *See* discussion *supra* Section I.B–C.

454. *See generally* LA. CIV. CODE art. 197 (2018); LA. CIV. CODE art. 209(C) (2005).

455. *See* discussion *supra* Part III.